Supreme Court, U.S.
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No. 92-1124

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CLARKSON PUCKLE GROUP, LTD., ERAS (INTERNATIONAL), LTD., CLARKSON PUCKLE INTERNATIONAL REINSURANCE, LTD., and BAIN CLARKSON, LTD.,

Petitioners,

v.

INTERNATIONAL INSURANCE COMPANY; CERTAIN UNDERWRITERS AT LLOYD'S, LONDON; DOMINION INSURANCE COMPANY, LTD.; HANOVER REINSURANCE COMPANY, LTD.; ALPINA INSURANCE COMPANY, LTD.; BRITISH NATIONAL INSURANCE COMPANY, LTD.; CNA REINSURANCE OF LONDON, LTD.; ANCON INSURANCE COMPANY (U.K.), LTD.; PEOPLE'S INSURANCE COMPANY OF CHINA; ST. KATHERINE'S INSURANCE COMPANY, P.L.C.; INSURANCE CORPORATION OF IRELAND, P.L.C.; YASUDA FIRE AND MARINE INSURANCE COMPANY (U.K.), LTD.; SCAN RE INSURANCE COMPANY, LTD.; BAVARIAN REINSURANCE COMPANY; AND, SOCIETE COMMERCIALE DE REASSURANCE, S.A.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT INTERNATIONAL INSURANCE COMPANY'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether this Court should exercise its discretion under Supreme Court Rule 10 and issue a writ of certiorari where the Court of Appeals's two-line unpublished order declining to consider petitioners' appeal for lack of appellate jurisdiction was manifestly correct, where no other Court of Appeals has yet considered the same question, and where the petition fails to present special and important reasons for review.

SUPREME COURT RULE 29.1 LISTING

The parent companies of International Insurance Company are Crum & Forster, Inc., Xerox Financial Services, Inc. and Xerox Corp. There are no subsidiaries or affiliates of International Insurance Company that are not wholly owned.

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RESPONDENT INTERNATIONAL INSURANCE COMPANY'S BRIEF IN OPPOSITION

SUPPLEMENTAL STATEMENT OF THE CASE

Respondent, International Insurance Company ("IIC"), is an Illinois insurance company that acted as a nominal "fronting" insurer for an international pool of reinsurers on a series of Environmental Impairment Liability ("EIL") policies from 1981 through 1983. Respondents, Underwriters at Lloyd's, London et al. ("excess reinsurers"), are the insurance syndicates and reinsurance companies that reinsured IIC on these EIL policies. The EIL policies IIC issued were 100% reinsured by the reinsurance pool in 1981 and 1982, and over 98% reinsured by the pool in 1983.

Petitioners Clarkson Puckle Group, Ltd., ERAS (International), Ltd., Clarkson Puckle International Reinsurances, Ltd. and Bain Clarkson, Ltd. (collectively, "Clarkson" or "petitioners") are four English companies that organized and managed the EIL reinsurance pool. Specifically, Clarkson sought out and organized reinsurance capacity for writing EIL risks, and arranged for the placement of reinsurance with particular carriers. Clarkson also sought out and arranged for nominal insurers, including IIC, to "front" EIL policies in the United States. With respect to the selection of risks and issuance of policies, Clarkson performed or supervised the underwriting process. Finally, when insureds made claims under the policies, Clarkson performed the claims handling function in the initial stages of the program. In proceedings below, District Judge George Lindberg rightly characterized Clarkson's role in the EIL program as being the "eye of the hurricane." (App. Resp. 60a.)

Approximately one year before the pool ceased underwriting, two of the Clarkson entities, Clarkson Puckle Group, Ltd. and ERAS (International), Ltd., entered into

written contracts with IIC with respect to IIC's participation in the EIL program. These contracts both contained arbitration clauses. The remaining two Clarkson petitioners, Clarkson Puckle International Reinsurance, Ltd. and Bain Clarkson, Ltd., are not parties to the contracts. (App. Resp. 1a.)

In November, 1988, IIC commenced the underlying action against the excess reinsurers seeking reimbursement for the $19 million settlement of an EIL claim with Smithkline Beckman Corporation. In 1990, the excess reinsurers filed an amended counterclaim against IIC that contained claims of common law fraud, conspiracy and breach of contract, as well as claims under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1962(a)-(d). The excess reinsurers alleged that Clarkson acted as IIC's agent for underwriting and claims handling with respect to the EIL program. In February, 1991, IIC added Clarkson as a defendant/third-party defendant to this lawsuit, alleging that Clarkson acted as an agent of the reinsurers, including the defendant excess reinsurers, in underwriting and claims-handling under the EIL program.

On June 7, 1991, petitioners moved to stay IIC's claims against them under Section 3 of the Federal Arbitration Act, 9 U.S.C. §3, invoking the arbitration clauses contained in the written agreements between IIC and Clarkson Puckle Group, Ltd. and ERAS (International), Ltd. All four Clarkson entities moved for the stay, although Clarkson Puckle International Reinsurance, Ltd. and Bain Clarkson. Ltd. are not signatories to the written agreements and have never acknowledged that they are subject to them. Petitioners simultaneously moved for the entry of a protective order staying all discovery until the district court ruled on petitioners' motion to stay further proceedings pending arbitration. IIC opposed Clarkson's motions,

principally arguing that Clarkson had waived its right to arbitration by previously suing IIC in multiple lawsuits in England arising out of the EIL program.

On December 20, 1991, the magistrate judge recommended that petitioners' motion to stay pending arbitration be granted. (App. Resp. 31a.) On January 15, 1992, the magistrate judge recommended that Clarkson's motion for a protective order be denied and that Clarkson should be subject to discovery. (App. Resp. 49a.) Clarkson's objections to the January 15, 1992 ruling were overruled and subsequent attempts to stay discovery were denied by the district court. In orders issued on February 12 and 27, 1992, the district court adopted the magistrate judge's report and recommendation denying Clarkson's motion for a protective order. (App. Resp. 69a-70a.) On June 12, 1992, the district court adopted the magistrate judge's report and recommendation that the trial of the issues between Clarkson and IIC be stayed pending arbitration. (App. Resp. 71a.)

On February 27, 1992, petitioners filed a petition for writ of mandamus with the United States Court of Appeals for the Seventh Circuit. The Seventh Circuit denied the petition without a written opinion on March 13, 1992. (App. Resp. 73a.) Petitioners filed a petition for rehearing *en banc* which was denied without dissenting opinion on April 21, 1992. (App. Resp. 75a.)

On June 26, 1992, petitioners appealed the district court's June 12, 1992 order, contending that by being required to respond to discovery initiated by the remaining parties as to issues not encompassed by any arbitration agreement, petitioners had been denied the stay to which they were entitled under Section 3. On July 16, 1992, IIC moved to dismiss the appeal for lack of jurisdiction. On September 30, 1992, the Seventh Circuit granted

IIC's motion to dismiss and dismissed petitioners appeal without a published opinion. (App. Resp. 77a.)

Contemporaneously with Clarkson's attempts to secure appellate relief, it provided substantial responses to discovery in the underlying action. The Clarkson defendants made substantial document production during the spring and summer of 1992. Moreover, it has produced three corporate employees for deposition: Mr. Don Whittle in July, 1992 and Messrs. Martin Pearson and Derek Coultham in January, 1993.

SUMMARY OF THE ARGUMENT

This case involves the fundamental rule that this Court's review of an issue on writ of certiorari is warranted only where the petition establishes special and important reasons for such consideration. *See* Supreme Court Rule 10. The Seventh Circuit's dismissal of the appeal for want of jurisdiction, because petitioners had been granted a stay pending arbitration under Section 3 of the Federal Arbitration Act, 9 U.S.C. §16(b)(1), does not warrant this Court's review for several reasons. First, the two questions presented raise issues that no Court of Appeals—including the Seventh Circuit here—has yet addressed in a published opinion. They arise from a two-line unpublished order dismissing petitioners' appeal for lack of appellate jurisdiction. No Court of Appeals has addressed the questions presented in any published opinion. Certainly, in this embryonic stage of development, no conflict exists between the ruling below and the decisions of either this Court or any Circuit Courts of Appeals. Second, petitioners have failed to present any other special and im-

portant reason for this Court's review of this matter. Third, the Seventh Circuit's dismissal of the petitioners' appeal was manifestly correct. Fourth, the district court's orders staying the trial but ordering petitioners to participate in discovery were well justified under existing precedent and not an abuse of the district court's discretion.

REASONS FOR DENYING THE WRIT

I.

THE PETITION FAILS TO DEMONSTRATE A GENUINE CONFLICT AMONG THE COURTS OF APPEALS

A. The Questions Presented Are Premature For Review By Means Of Certiorari

Review by this Court on writ of certiorari is generally limited to the questions presented or those fairly comprehended within it. Supreme Court Rule 14.1(a); *Adickes v. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *Berkemer v. McCarty*, 468 U.S. 420, 443 n.38 (1984). Accordingly, the instant petition is limited to the narrow issue of whether the Courts of Appeals have jurisdiction to entertain immediate appeal from district court orders granting a party's request for stay pending arbitration, but nonetheless ordering the party to respond to discovery, where other parties and non arbitrable issues remain. This question arises only from the Seventh Circuit's dismissal of petitioners' appeal in a two-line unpublished order. No other Court of Appeals has addressed the question in a published opinion. On this minimal record, and at this embryonic stage of development, the questions presented should not be reviewed by means of certiorari.

It is not the function of certiorari to decide issues that no Court of Appeals has discussed. Rather, the writ of certiorari is properly reserved for the final resolution of issues that have received mature analysis and development--with conflicting results—in the Courts of Appeals. The language of Supreme Court Rule 10 states that the principal purpose of certiorari is the resolution of fully developed conflicts among the Courts of Appeals or courts of last resort in the states. This Court's opinions have also so characterized the remedy. *McCray v. New York*, 461 U.S. 961, 962-63 (1983).

Two important policies are served by insisting that issues ripen through repeated treatment in the lower courts. The first is a matter of economy. This Court has not the resources to examine every interesting question of first impression arising in the federal courts. Given sufficient opportunity to percolate, an issue frequently will receive consistent treatment in the Courts of Appeals, obviating any need for review by this Court. The second concern is the quality of this Court's decision making. By addressing only those issues that have matured into a genuine conflict among Courts of Appeals, this Court has the benefit of previous analysis of competing legal authorities, competing considerations of public policy, and the application of rules to differing sets of facts.

No published opinion of any Court of Appeals has addressed the propriety of an order such as the District Court's order below, granting a party's request for stay pending arbitration, but nonetheless requiring that party's compliance with discovery. Indeed, the Court of Appeals for the Seventh Circuit issued no written opinion addressing the issue *in this case*, disposing of the matter in an unpublished, two-line order. Section 16 of the Federal Arbitration Act, upon which petitioners predicate

their claim of appellate jurisdiction, was added to the Act by means of a 1988 amendment. In the few intervening years, the parameters of the amendment have not been discussed in any published opinion in any federal court. The absence of such reported opinions suggests that the issue presented by the petition is not a frequent or important problem in the lower federal courts. At this early stage of the issue's development, there is no demonstrated necessity for review by this Court and no developed bodies of competing doctrine for this Court to evaluate.

By way of contrast, petitioners' authorities from the field of qualified immunity demonstrate the level of discussion and refinement in the Courts of Appeals, desirable before an issue warrants consideration by this Court on writ of certiorari. For example, in *Mitchell v. Forsyth*, 472 U.S. 511 (1984), this Court granted a petition for certiorari to review the appealability of orders regarding absolute and qualified immunity entered before final judgment. This Court expressly acknowledged that the issue was one that has divided the Courts of Appeals, noting that three circuits had held such orders appealable, three had held them non-appealable, and still another had ruled that a district court's denial of qualified immunity was not appealable when claims for injunctive relief would have to be adjudicated regardless of the resolution of damages claims. Similarly, in *Burns v. Reed*, ____ U.S. ____, 111 S. Ct. 1934, 1938 n.2 (1991), this Court granted certiorari because "the courts are split on the issue of whether absolute immunity extends to the act of giving legal advice to the police," comparing a Tenth Circuit case with decisions in the Seventh, Eighth and Eleventh Circuits. In contrast, the issue of appellate jurisdiction over a district court's order *granting* a stay under § 16 of the Federal Arbitration Act has not been addressed in a published opin-

ion by any Circuit Court of Appeals. This Court should not be the first Court to address it.

In its current posture, it is difficult to imagine issues less ripe for mature consideration by means of certiorari. Effectively, the petition invites this Court to address an issue of first impression. It is far from clear that any inconsistent treatment of the questions presented will develop in the lower courts, requiring resolution by this Court. If a conflict develops, this Court's ultimate resolution will profit from further experimentation, analysis, and experience with competing rules in the lower courts. At present, however, the questions presented are premature for the granting of certiorari.

B. The Questions Presented Are Of Little Difficulty Or Public Importance

In proceedings below, the courts have been uniform and unanimous in their treatment of the questions presented. An able magistrate judge made the initial recommendation to grant petitioners' request for stay pending arbitration, while requiring their participation in discovery. His recommendations were adopted without qualification by the district judge. Petitioners first sought appellate relief from the Court of Appeals for the Seventh Circuit through a petition for mandamus. The petition was denied. Subsequently, the Seventh Circuit also denied petitioners' petition for rehearing and suggestion for rehearing *en banc*. Finally, the Seventh Circuit dismissed the appeal from which the instant petition arises. From the magistrate judge through the Court of Appeals, not a single dissent appears of record. The uniform treatment of the questions presented in proceedings below does not suggest an issue of great legal difficulty. In particular, the Seventh Circuit's view that the issue did not merit a written opin-

ion—notwithstanding three requests for appellate review—suggests neither a difficult issue, nor one of any public or precedential importance.

C. Unable To Demonstrate A Conflict Among The Courts Of Appeal On The Jurisdictional Issue, Petitioners Unsuccessfully Attempt To Raise A Conflict On The Merits Of The District Courts' Orders

Although this Court has consistently enforced orders to stay trial proceedings as to issues deemed arbitrable under an arbitration agreement, this Court has never articulated a broad rule immunizing a party to an arbitration agreement from ordinary civil discovery pertaining to non-arbitrable issues that remain in the case. None of the cases cited by petitioners encompassed the stay of pretrial discovery along with the stay of a "trial" or stay of the "proceedings" under § 3 of the Federal Arbitration Act. Instead, relief from discovery obligations has been narrowly tailored to the factual circumstances of each particular case. Both *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985), and *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), cited by petitioners, noted that the qualified immunity doctrine entitled government officials to "immunity from suit," including dismissal before the commencement of discovery. *Mitchell*, 472 U.S. 511, 526, *citing Harlow*, 457 U.S. 800, 817-18. Neither case involved the proper construction or application of a stay under Section 3 of the Federal Arbitration Act.

Petitioners erroneously contend that there is a conflict among the circuits created by the Seventh Circuit's dismissal of the appeal and the decisions of other Courts of Appeals in *Corpman v. Prudential-Bache Securities, Inc.*, 907 F.2d 29 (3d Cir. 1990), *Suarez-Valdez v. Shearson Lehman/American Express, Inc.*, 858 F.2d 648 (11th Cir.

1988), and *Miller Brewing Co. v. Fort Worth Distributing Co.*, 781 F.2d 494 (5th Cir. 1986). The existence of such a conflict is a matter of considerable speculation in the absence of an opinion on this subject from the Seventh Circuit in this case. Moreover, petitioners' cases are entirely distinguishable and incapable of creating the purported conflict.

Petitioners rely, exclusively and simplistically, on precedents arising from basic, unadorned, two-party (one plaintiff-one defendant) disputes. If parties to such a dispute have an agreement to arbitrate the issue in question, the agreement completely subsumes their lawsuit. In such circumstances, it is easy, as petitioners suggest, to move the parties out of court. However, matters are not always so simple. Even as between two parties, an arbitration agreement may not embrace all issues. When multiple parties are introduced—some signatories to arbitration agreements and others not—matters become more complex still. In the real world, in which the federal courts operate daily, the management of concurrent litigation and arbitration is a recurring problem for which the courts require flexible tools. Simplistic reliance on the "plaintiff versus defendant" model provides limited assistance in administering commercial litigation in the federal courts today.

The district court expressly distinguished the facts of this case from cases in which all of the parties and all of the issues are encompassed within the parameters of an arbitration agreement. First, it noted that "at least three of the Clarkson defendants are parties to this action whether or not arbitration is ordered." (App. Resp. 51a.) Second, the testimony of the Clarkson's employees and production of Clarkson's records were determined to be "essential to the adjudication of the [excess reinsurers'] counterclaim, which has not, of course, been referred to

arbitration." (App. Resp. 52a.) Third, even if they were not parties to this case, Clarkson would be subject to third party discovery and even their dismissal from this action would not justify a complete stay of discovery as to them. (App. Resp. 52a.) The district court concluded that "(s)ince at least some of the Clarkson defendants were key players in the EIL program, to limit IIC's discovery against the Clarkson defendants to what the arbitrators might allow would be fundamentally unfair . . . ." (App. Resp. 53a.)

Opinions of this Court and other federal courts, including authorities advanced by petitioners, recognize the complexities of concurrent litigation and arbitration, and the federal court's authority to order discovery from arbitrating parties in appropriate circumstances. In *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985), this Court held that the Arbitration Act requires the arbitration of pendent arbitrable claims when one of the parties files a motion to compel, even where it would result in inefficient maintenance of separate proceedings and separate forums. *Id.* at 217. Arbitration agreements are to be enforced even where, as in the proceedings below, such a course would result in bifurcated proceedings. *Id.* at 218. While *Dean Witter* clearly mandates the arbitration of arbitrable claims, the decision does not preclude and, indeed, tends to suggest that litigation of non-arbitrable claims in the district court—including discovery—must proceed regardless of inefficiency or "piecemeal" litigation. *Id.* at 221. ("The preeminent concern of Congress in passing the Act was to enforce private agreements . . . and that concern requires that we rigorously enforce agreements to arbitrate, even if the result is "piecemeal" litigation . . . .). In *Suarez-Valdez v. Shearson Lehman/American Express, Inc.*, 858 F.2d 648 (11th Cir. 1988), the Eleventh Circuit expressly distinguished that case from actions in which

a district court has ordered discovery to proceed notwithstanding entry of a stay, because the district court found some "special need" for the discovery. *Id.* at 649, *citing Bigge Crane & Rigging Co. v. Docutel Corporation*, 371 F. Supp. 240 (E.D.N.Y. 1973).

Courts have construed the language of Section 3 to authorize the entry of orders that "stay the trial," but not the entire action. In *Knorr Brake Corp. v. Harbill, Inc.*, 556 F. Supp. 489 (N.D. Ill. 1983), the trial court distinguished "stay[ing] the trial" of "issues" referable to arbitration, from staying the entire "case." Finding that the granting of a stay pending arbitration of issues did not divest the court of equitable jurisdiction, the court reasoned as follows:

> As is often the case, the truth lies between the contending positions: Stay pending arbitration of the issues "referable to arbitration" does not divest this Court of its equitable jurisdiction. Section 3's very language confirms this conclusion, for it speaks of "stay[ing] the trial" of an action until the arbitration of "any issue referable to arbitration under an agreement."

556 F. Supp. 489, 494. The granting of discovery during a Section 3 stay lies within the trial court's discretion. *See, e.g., Bigge Crane & Rigging Co. v. Docutel Corp.*, 371 F. Supp. 240 (E.D.N.Y. 1973) (permitting discovery to proceed). Courts have expressly allowed discovery to be conducted in disputes to be arbitrated where "extraordinary circumstances" are shown. *See also Marcune v. Coker*, 678 F. Supp. 121 (E.D. Pa. 1988); *Bergen Shipping Co. v. Japan Marine Serv., Ltd.*, 386 F. Supp. 430 (S.D.N.Y. 1974).

Moreover, Section 16(b)'s express reference to Section 1292(b) of Title 28 makes clear the interlocutory—and hence

not appealable—nature of an order granting the stay of a trial. Title 28 U.S.C. § 1292(b) allows an order "not otherwise appealable" to be presented to the Court of Appeals for acceptance only where a district court finds that the order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigator." 28 U.S.C. § 1292(b). Here, the district court made no such finding. Whether to grant discovery pending arbitration in a particular case is, as set forth above, a question committed to the discretion of the district court.

Petitioners' simplistic reliance on decisions of this Court and various circuit courts arising from elemental one plaintiff-one defendant disputes is wholly misplaced. Those authorities create no conflict on the issue of appellate jurisdiction and evade the weight of authority recognizing a district court's authority to order discovery concurrently with arbitration, in more complex cases. Until this Court is presented with a genuine conflict, arising from cases with analogous facts, there is no issue ripe for review.

II.

THE COURT OF APPEALS'S ORDER WAS MANIFESTLY CORRECT

A. Interlocutory Orders Staying Trial Of An Action Pending Arbitration Are Not Appealable

The district court's order of June 12, 1992 accepted the magistrate judge's December 20, 1991 recommendation that petitioners' motion for a stay under 9 U.S.C. § 3 pending arbitration be granted. (App. Resp. 71a.) The granting of a stay is an interlocutory order from which an appeal may not be taken under Section 16 of the Federal

Arbitration Act. 9 U.S.C. § 16(b)(1). The recommendation of the magistrate judge, adopted by the district judge, stated: "that the motion of the Clarkson defendants to stay proceedings pending arbitration is granted, and that the parties be ordered to proceed to arbitration in accordance with the arbitration provisions of the Agreement." (App. Resp. 48a.)

The Seventh Circuit appropriately dismissed petitioners' appeal from this interlocutory order. Although interlocutory orders *denying* arbitration are appealable (9 U.S.C. § 16(a)(1)(A-C)), interlocutory orders *granting* motions to stay pending arbitration are not (9 U.S.C. § 16(b)(1)). Section 16(b) provides in relevant part:

> (b) Except as otherwise provided in Section 1292(b) of title 28, an appeal may not be taken from an interlocutory order—
>
> (1) granting a stay of an action under section 3 of this title;

9 U.S.C. § 16(b)(1). The Seventh Circuit has noted that "the statute codifies the distinction that . . . final decisions denying arbitration are appealable and interlocutory decisions granting arbitration are not." *Perera v. Siegel Trading Co., Inc.*, 951 F.2d 780, 783 (7th Cir. 1992).

Section 16(b)'s reference to Title 9 U.S.C. § 3 makes clear that no appeal should lie from the district court's order because Section 3 speaks in terms of orders "staying the trial." Section 3 of the Federal Arbitration Act authorizes federal courts to "stay the trial" of an action where the issue involved is referable to arbitration under a written arbitration agreement. 9 U.S.C. § 3. Section 3 provides in relevant part as follows:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable

> to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties *stay the trial* of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 3 (emphasis added). Thus, the order staying the trial in this case did not vest the Court of Appeals for the Seventh Circuit with appellate jurisdiction over an admittedly interlocutory order pertaining to discovery.

In proceedings below, petitioners received the stay of trial to which they were entitled by the arbitration agreement—plainly a non-appealable order. The petition's assertion of appellate jurisdiction rests upon two further premises. In substance, petitioners assert both that in addition to an arbitral forum, their arbitration agreement confers an immunity from civil discovery and that any impairment of that entitlement is likewise subject to immediate appellate review. Neither premise bears scrutiny. The district court correctly observed below that petitioners are subject to the ordinary burdens of civil discovery, at least to the same extent as any third party. (App. Resp. 52a.) Moreover, even if some contractual immunity from discovery could be inferred, the plain language of Section 16 does not authorize immediate appeal from an order affecting that right. Such an interpretation would vastly complicate the simple, limited scheme for appellate review embodied in Section 16 and flood the Courts of Appeals with review of interlocutory discovery orders. Dismissal of the appeal below was manifestly correct.

B. The District Court's Orders Were Not Appealable Under The Collateral Order Doctrine

Title 28 U.S.C. § 1291 vests courts of appeals with jurisdiction over appeals only from "final decisions" of the district courts. The "collateral order" exception to the final judgment rule recognizes a "small class" of prejudgment orders which "finally determine claims of right separable from, and collateral to, rights asserted in the action, [and are] too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *See Richardson-Merrell Inc. v. Koller*, 472 U.S. 423, 430 (1985), *citing Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). This limited class of prejudgment orders is deemed sufficiently important and sufficiently separate from the underlying dispute that immediate appeal should be available. *See Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 375 (1987).

This Court has stressed that the "narrow exception" of the "collateral order" doctrine is limited to interlocutory orders "affecting rights that will be irretrievably lost in the absence of an immediate appeal." *See Richardson-Merrell, Inc. v Koller*, 472 U.S. 424, 430-31; *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1984) (a major characteristic of a claim appealable under [the] "collateral order" doctrine is that "unless it can be reviewed before the proceedings [terminate], it never can be reviewed at all"). Consistent with this Court's opinions, the Seventh Circuit has recognized that an interlocutory order at a minimum must satisfy three conditions to be considered "final" within the meaning of the "collateral order" doctrine:

> It must "conclusively determine the disputed question," "resolve an important issue completely sepa-

> rate from the merits of the action," and "be effectively unreviewable on appeal from a final judgment."

In re Moens, 800 F.2d 173, 176, (7th Cir. 1986), *citing Richardson Merrell, Inc. v. Koller*, 472 U.S. 424, 431.

The interlocutory orders entered by the district court, staying the proceedings on arbitrable issues but requiring petitioners to participate in discovery, do not satisfy all three conditions of the collateral order doctrine.

Petitioners attempt to establish that there has been a "conclusive determination" of an "important issue" by mischaracterizing the nature of both the district court's orders and petitioners' rights under the arbitration agreements. Although the district court's June 12, 1992 order granted petitioners' motion for a stay of proceedings with regard to issues subject to arbitration, the district court's orders of February 12 and 27, 1992 require petitioners to submit to discovery from those parties that remain in the case. The orders do not, as petitioners contend, require them "to participate as parties in all the pending and future pretrial proceedings" (Pet. for Cert. at 14).

Petitioners' argument that the Section 3 stay of the trial on the arbitrable issues immunizes them from ordinary civil discovery issued by remaining parties to the suit is meritless. The district court correctly ruled that the arbitration agreements "did not entitle petitioners to reasonably expect to be shielded from discovery of evidence which is important to resolution of the dispute that remains between IIC and the reinsurers," which is not subject to arbitration. (App. Resp. 54a.) Even if petitioners were not parties to this case, they would be subject to third party discovery, and even their dismissal would not justify a complete stay of discovery as to them. (App. Resp. 52a.) The district court accurately characterized petitioners

alternatively as "the eye of the hurricane" (App. Resp. 60a) and "key players in the EIL program" (App. Resp. 53a), concluding that it would be "fundamentally unfair" to limit IIC's discovery against petitioners to what the arbitrators might allow. (App. Resp. 53a.) The orders do not conclusively deprive petitioners of any "right" to immunity from discovery.

The arbitration clauses function as little more than forum selection clauses, enabling petitioners to demand that their claims be adjudicated in the arbitral forum rather than the district court. Similar to the forum selection clause at issue in *Lauro Lines S.R. L. v. Chasser*, 490 U.S. 495 (1988), the arbitration clauses give petitioners the right to be "free from trial" or to "have the binding adjudication of claims occur in a certain forum", but do not entitle them to avoid being sued or being subject to suit in a different forum. *Id.* at 501. In *Van Cauwenberghe v. Biard*, 486 U.S. 517 (1988), this Court held that although a party may be immune from service of process in connection with extradition proceedings, the "right not to be burdened with a civil trial itself is not an essential aspect of this protection," even if service of process is necessary for the exercise of jurisdiction. *Id.* at 525. Similarly, although arbitration agreements entitle petitioners to adjudicate their claims in a different forum, they do not immunize them from all proceedings that continue in the case after their claims are stayed pending arbitration.

As to the third requirement of the collateral order doctrine, petitioners' claim that the district court's orders are "unreviewable on appeal" is specious. An order is "effectively unreviewable" on appeal from final judgment only if it "implicates rights [that] could be lost or irreparably harmed if immediate review were denied." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 376

(1981). Pretrial discovery orders generally are not immediately appealable because they may be effectively reviewed after final judgment. *Sedlock by Sedlock v. Bic Corp.*, 926 F.2d 757, 758 (8th Cir. 1991). As the Seventh Circuit has noted:

> The adjudication of contempt is no more final than the discovery order it enforces. The party may comply and on appeal from the final judgment assign the need to do so as error; or the party may refuse to comply, let the fine mount up, and on appeal from the final judgment assign the citation as error, recouping or avoiding the sanction. The mounting fines put the party to a hard choice, for if he guesses wrong the sum due at the end of the case may be large, but discovery may be expensive for other reasons too. *It is not unusual in commercial litigation for compliance with discovery requests to cost more than a million dollars, yet discovery orders are not on that account reviewable.*

Powers v. Chicago Transit Auth., 846 F.2d 1139, 1141 (7th Cir. 1988) (emphasis added) (civil contempt order for failure to comply with discovery not appealable as a "final decision" and not a usurpation of power required for issuance of mandamus).

The district court's June 12, 1992 order adopting the magistrate judge's recommendation and granting petitioners' motion to stay the trial pending arbitration was not a final judgment immediately appealable under 28 U.S.C. § 1291 or under the Federal Arbitration Act. To the extent the district court's earlier orders (February 12 and 27, 1992) adopting the magistrate judge's recommendation and denying petitioners' motion for a protective order direct petitioners—two of whom are not parties to any arbitration agreement—to provide discovery in the federal court proceedings, they constitute interlocutory

pretrial discovery orders that may be effectively reviewed after final judgment.

Petitioners' contention that, as parties subject to arbitration, no trial judgment will be entered against them in the district court does not render the discovery orders unreviewable. As the district court noted, petitioners may demonstrate that compliance with discovery requests will cause "annoyance, embarrassment, oppression, or undue burden or expense" and seek a protective order under Fed. R. Civ. P. 26(c). (App. Resp. 54a.) The district court concluded that petitioners had not made the showing necessary to justify an order limiting discovery against them. *Id.* This ruling does not preclude petitioners from seeking protection under Rule 26(c) in the future.

The interlocutory orders at issue do not fall within the narrow class of collateral orders reviewable prior to final judgment. Petitioners' argument is predicated on an illusory "right" to immunity from civil discovery. The ordinary burdens of civil discovery do not fall within the narrow class of "important issues" contemplated by the collateral order exception, nor are discovery rulings unreviewable after judgment. Petitioners would turn the "narrow exception" of the collateral order doctrine into a flood of appeals from interlocutory discovery orders. The Seventh Circuit Court of Appeals was correct to dismiss the appeal below.

CONCLUSION

For the reasons set forth above, Respondent International Insurance Company respectfully requests that the Court deny the Petition.

Respectfully submitted,

FRANCIS D. MORRISSEY
Counsel of Record
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Attorneys for Respondent,
International Insurance Company

RESPONDENT'S APPENDIX

AGENCY-COMPANY AGREEMENT

This Agency-Company agreement is made by and between Clarkson Puckle Group Limited through its wholly-owned subsidiary, ERAS (International), Limited (Agent), and International Insurance Company, Chicago, Illinois (Company).

It is agreed between the Company and the Agent that:

I. AUTHORITY OF THE AGENT

The Agent is an independent contractor, not an employee of the Company and, subject to the terms of this Agreement and the requirements imposed by law, is authorized to (a) solicit, quote, bind with the approval of the company and process policies of Environmental Impairment Liability, (b) settle claims arising out of such policies and (c) provide such other services as required by this Agreement.

II. SOLICITATION OF BUSINESS AND POLICY QUOTATIONS

All coverage bound under this Agreement shall be submitted to the Agent through registered Lloyd's brokers. The Agent shall have sole responsibility for determining rates and premiums and for the preparation of quotations.

III. POLICY ISSUANCE

The Agent shall process policies on forms mutually agreed by Agent and Company. Policies shall be processed in accordance with the provisions of attachment A of this Agreement.

IV. REINSURANCE

Agent will provide 100% reinsurance of each policy issued under this Agreement through companies acceptable to the Company. Such reinsurance will allow an 8% overrider to the Company calculated on gross written premium and will be process in accordance with provisions of Attachment A of this Agreement. Agent shall obtain the Agreement of each reinsurer to comply with the Indemnification and letter of Credit provisions as stated in Attachment B of this Agreement.

V. PREMIUM COLLECTION AND ACCOUNTING

Agent shall be solely responsible for the collection of all premiums and payment of return premiums. Except as specifically agreed on an individual account basis commissions paid by Agent to Producers shall not exceed 15% if no U.S. Wholesale Agent is involved or 17½% if a U.S. Wholesale Agent is involved. Accounting of all premiums shall comply with the provisions of Attachment C of this Agreement.

VI. POLICY TERM AND TERRITORIAL LIMITATIONS

Polices shall be issued for a period of either 12 months plus odd time (not to exceed 18 months in all) or on a continuous basis including annual review and cancellation provisions. All Insured shall be domiciled in the U.S.A. or have substantial operations in the U.S.A. and a U.S.A. address of record.

VII. LIMITS OF LIABILITY

No policy shall be issued for limits greater than—

$20,000,000. any on claim
$40,000,000. annual aggregate

or as otherwise be from time to time agreed in writing between the Company and the Agent.

VIII. CLAIMS

Agent shall have sole responsibility for the proper handling and payment of all claims. Claim accounting shall be in accordance with the provisions of Attachment D of this Agreement.

IX. INDEMNIFICATION

Agent shall indemnify and hold harmless the Company against any claims or liabilities the Company may become obligated to pay based on any actual or alleged error of the Agent in the processing or handling of business or alleged error of the Agent in the processing or handling of business placed under this Agreement or any actual or alleged failure of the Agent to comply with the terms and conditions of this Agreement.

X. ASSIGNMENT

The Agent may, subject to prior written approval by the Company, assign to others such rights and duties as accrue to the Agents under this Agreement.

XI. CHANGES AND CANCELLATION

This Agreement may be revised at any time by mutual agreement of the Agent and the Company. This Agreement may be terminated by either the

Agent of the Company by giving at least 90 days written notice in advance of each annual anniversary date, or immediately upon either party giving written notice to the other in the event of abandonment, fraud insolvency or gross or wilful misconduct on the part of such other party. Termination of this Agreement shall not relieve Agent of responsibility for those policies place under this Agreement prior to its termination.

Any controversy or disagreement arising out of or relating to this Agency-Company Agreement or transactions contemplated hereby shall be settled by arbitration in the state and county in which the Company's headquarters are located. Any such controversy or disagreement shall be submitted to a panel of three arbitrators chosen from a list provided by The Defense Research Institute, Inc., 1100 West Wells Street, Suite 702, Milwaukee, Wisconsin 53233. Commencing with the party first requesting arbitration, the parties to the dispute shall take turns striking names from the list provided by the Defense Research Institute, (after first eliminating the names of any persons on the list who are unable or unwilling to serve) until only three remain, and those three shall constitute the panel of arbitrators.

Each party shall submit its case to the arbitrators within thirty days after their appointment or within such period as may be agreed by the arbitrators. All arbitrators shall interpret this Agency-Company Agreement as an honorable engagement rather than as merely a legal obligation they are relieved of all judicial formalities and may be made as soon as practicable, but no later than sixty days follow-

ing termination of the hearings unless all parties to the dispute consent to an extension.

The decision in writing of any two arbitrators, when filed with the parties, shall be final and binding on the parties to the dispute. Judgement on the award may be entered in any Court having jurisdiction thereof. The costs of the arbitrators shall be borne equally by all parties to the dispute.

If for any reason a dispute cannot be resolved by the preceding arbitration procedure, then all parties hereto agree that such a dispute may be resolved only by an appropriate state or federal Court in the jurisdiction where the headquarters of the Company are located. All objections of personal jurisdiction and venue in such Courts are hereby waived. Clarkson Puckle Group and ERAS (International), Limited hereby appoint *R.S. Faron, Lane & Mittendorf* whose address is *215 Connecticut Avenue, N.W. Washington D.C. 20006*, as their agent for Service of Process.

IN WITNESS WHEREOF the Agent and the Company have caused this Agreement to be executed this *Fourth* day of *November*, 19*82*.

FOR THE AGENT	FOR THE COMPANY
1. BY *Charles Mueller* ERAS (International), Limited	BY *Frank Kinnett*
TITLE *Managing Director*	TITLE *Vice President*
WITNESS *R.M. Aickin*	WITNESS *Jeannette Shelton*
2. BY *Ian Crawford Smith* Clarkson Puckle Group	
TITLE *Director*	WITNESS *not legible*

I. The Agent shall advise the Company of its wish to bind a policy. The Company shall advise the Agent within one working day of receipt of such advise whether or not it is willing to bind such a policy.

II. Within 10 days of the binding date of each policy bound under this Agreement Agent will advise the Company by telex the following information:

1) Name and address of Insured
2) Effective date of coverage
3) Limits of liability
4) Premium
5) Producing Agent (including location)
6) Wholesaler (if any, including location)

III. Within 20 days of the binding date of each policy Agent will forward two copies of each policy to the Company along with supporting reinsurance documentation.

IV. Upon receipt of the binding telex, the Company shall advise Agent whether or not the Producer can provide his own countersignature. If not, the following countersignature procedures *must* apply:

1. The original and two copies of each policy will be sent to the London Agency, Atlanta, an affiliate of International Insurance company. The name and address of the producing Agent, and the commission payable must be included. Upon completion of the countersignature procedure the original policy will be mailed to the Agent.

2. The producer *must* be either a licensed resident or nonresident agent in the Insured's home state (the address shown in the Declarations). If a nonresident, the nonresident license number must be furnished with the original policy.

3. In the majority of states countersignature can be provided free of cost. Some states require a fee (usually 5% of the premium of 50% of commission, whichever is less) be paid to the countersigning Agent. These fees, if applicable, will be paid by the Company to the countersigning Agent and must be reimbursed by ERAS. (i.e.—a reduction in commission to the producing Agent will apply.)

   Note: If the producer is a wholesale broker either he *or* his producing agent can be the holder of the resident or nonresident license. In this case, The London Agency, Inc., must know the name and address of both the Wholesaler and his Producer. The following or similar formate to be used in presenting the needed information:

Attachment A—Processing Procedures

Insured:
Address:

Producer:
Address:

Wholesaler: (If applicable)
Address:

Percent commission paid by Underwriters to Producer: _____
Nonresident License No.: _____ (If applicable)

License is _____ Producer's _____ Wholesaler's

V. In States, other than Illinois and New York, where International Insurance Company is prohibited from providing Environmental Impairment Liability, the facilities of International Surplus Lines Insurance

Company may be utilized. In such cases, the following provisions will apply in lieu of Item IV above:

1. ISLIC must be used in any state:
   a) which has not approved International Insurance Company's policy filing, or
   b) Where the producer does not meet the licensing requirement of IV (2).
2. The provision of IV (1) must be followed since the company must sign the original policy as the authorized representative. (Refer London Agency telex dated February 2, 1982—also agreed with Charles Muller, Clarksons on February 10, 1982)
3. These policies are subject to surplus lines filings. Therefore the name, address and surplus line license number of the Agent responsible for making the filing must also be included.

I. INDEMNITY AGREEMENT

Within 30 days of the inception of this Agreement Agent will secure from each reinsurer and Indemnity Agreement in favor of the Company in the following form:

> In the event the Company pays or is held liable to pay an amount of loss in excess of policy limit because of alleged or actual bad faith or negligence on its part in rejecting a settlement within the applicable limits of its policy, or in discharging its duty to defend or prepare the defense in the trial of an action against its policyholder (including its duty to prepare or prosecute an appeal consequent upon such an action), the amount of loss in excess of the Company's policy limit shall be added to the amount of the Company's

policy limit and the sum thereof shall be subject to the terms of the contract.

Should any reinsurers be added during the currency of this Agreement, the above Indemnity Agreement will be secured in advance of the binding of any Insured.

II. LETTERS OF CREDIT

Within 30 days of the end of each calendar year Agent will secure for the Company clean irrevocable Letters of Credit from each reinsurer not authorized in the United States or not approved by the Company for general business. Such Letters of Credit will be from financial institutions acceptable tot he Company and in amount equivalent to the reinsurer's share of:

a) reinsurance premiums ceded during the preceding year but not earned by December 31 of that year

and

b) reserves for claims reported but not paid by December 31 of that year

III. INTERMEDIARY CLAUSE

The Agent, Clarkson-Puckle Group through its wholly-owned subsidiary, ERAS (International), Limited, is hereby recognized as the Intermediary negotiating this Agreement for all business hereunder. All communications (including, but not limited to notices, statements, premiums, return premiums, commissions, taxes, losses, loss adjustment expense, salvages and loss settlements) relating hereto shall be transmitted to the Company or the reinsurers through the Agent, Clarkson-Puckle Group through its wholly-

owned subsidiary, ERAS (International), Limited, located at Ibex House, Minorities, London EC3N 1H0, England. Payments of premium by the Company or by others to the Intermediary shall be deemed to constitute payment to the reinsurers. Payments by the reinsurers to the Intermediary shall be deemed only to constitute payment to the Company to the extent that such payments are actually received by the Company.

ATTACHMENT C—PREMIUM ACCOUNTING

1. Within 20 days following the end of each month Agent will provide a bordereau to the Company to include name and policy number of each risk bound during the previous month, limits of liability, gross premium, reinsurance premium and any special charges applicable (e.g. countersignature fees). Bordereau will identify whether each transaction was a new policy, a renewal policy, premium endorsement or cancellation.

2. The net difference between total gross premium and total reinsurance premium plus all special charges shall be paid to the Company within 120 days of the close of the month of the bordereau.

ATTACHMENT D—CLAIMS PROCEDURE

1. Each policy shall contain instructions to report all claims or incidents to

   Mr. Richard Power
   6 Commerce Drive
   Cranford, NJ 07016

   Telephone: (201) 272-2500
   Telex: 13-8234

2. Agent shall provide such loss and expense funds as shall become necessary for the handling of such claims and shall secure recovery of such funds directly from reinsurer(s). Company shall not be called upon to contribute to any claim or expense payment.

3. Mr. Richard Power shall, within 10 days, advise the Company of (1) the receipt of each claim or incident report, (2) the establishment or amendment of any claim reserve (3) the payment of any claim, costs or expenses.

4. Agent shall provide to the company of January 15 of each year a claims summary for the prior calendar year to include (1) total number of open claims, (2) total number of closed claims, (3) total open reserved amounts (4) total amount of paid claims and (5) total expense and cost amounts.

The London Agency, Inc.

AGENCY-COMPANY AGREEMENT

This Agency-Company Agreement is made by and between Clarkson-Puckle Group Limited through its wholly-owned subsidiary, ERA (International), Limited (Agent), and International Insurance Company, Chicago, Illinois (Company), and replaces the Agency-Company Agreement executed November 4, 1982.

It is agreed between the Company and the Agent that:

I. AUTHORITY OF THE AGENT

The Agent is an independent contractor, not an employee of the Company and, subject to the terms of this Agreement and the requirements imposed by law, is authorized to (a) solicit, quote bind with the approval of the Company and process policies of Environmental Impairment Liability, (b) settle claims arising out of such policies and (c) provide such other services as required by this Agreement.

II. SOLICITATION OF BUSINESS AND POLICY QUOTATIONS

All coverage bound under this Agreement shall be submitted to the Agent through registered Lloyd's brokers. The Agent shall have sole responsibility for underwriting, quoting and policy issuance, which shall be in accordance with Attachment of this Agreement.

III. REINSURANCE

The Agent via Clarkson Puckle International Reinsurance Limited small secure reinsurance acceptable to the Company in treaties approved by the

Company to apply to each policy issued under this Agreement.

IV. PREMIUM COLLECTION AND ACCOUNTING

Agent shall be solely responsible for the collection of all premiums and payment of return premiums. Except as specifically agreed on an individual account basis commissions paid by the Agent to Producers shall not exceed 15% if no U.S. Wholesale Agent is involved or 17½% if a U.S. Wholesale Agent is involved, the Company will pay to the Agent 26% or 28% respectively. Accounting of all premiums shall comply with the provisions of Attachment B of this Agreement.

V. POLICY TERM AND TERRITORIAL LIMITATIONS

Policies shall be issued for a period of either 12 months plus odd time (not to exceed 18 months in all). All insurers shall be domiciled in the U.S.A. or have substantial operations in the U.S.A. and a U.S.A. address of record.

VI. LIMITS OF LIABILITY

No policy shall be issued for limits greater than—

$20,000,000. any one claim
$40,000,000. annual aggregate

or as otherwise be from time to time agreed in writing between the Company and the Agent.

VII. CLAIMS

Agent shall have sole responsibility for the handling and payment of all claims, in accordance with Attachment C of this Agreement.

VIII. INDEMNIFICATION

Agent shall defend, indemnify and hold harmless the Company against and any all claims or liabilities based on any actual or alleged bad faith or negligence of the Agent when such bad faith or negligence arises out of or is alleged to have arisen out of the processing or handling of business under this Agreement or any actual or any alleged failure of the Agent to comply with the terms and conditions of this Agreement.

If requested, and practicable, the Company will afford the Agent an opportunity to be associated with the Company, to the extent permitted by law, and at the expense of the Agent, in the defense of any claim or proceeding involving this Agreement and the Company will cooperate in ever respect in the defense or control of such claim, suit or proceeding.

IX. ASSIGNMENT

The Agent may, subject to prior written approval by the Company, assign to others such rights and duties as accrue to the Agents under this Agreement.

X. CHANGES AND CANCELLATION

This Agreement may be revised at any time by mutual agreement of the Agent and the Company. This Agreement may be terminated by either the Agent or the Company by giving at least 90 days written notice in advance of each annual anniversary date, or immediately upon either party giving written notice to the other in the event of abandonment, fraud, insolvency or gross or willful

misconduct on the part of such other party. Termination of this Agreement shall not relieve the Agent of responsibility for those policies placed under this Agreement prior to its termination.

XI. ARBITRATION

A. All disagreements which may arise under this Agreement between the parties hereto shall be referred to the decision of a Board of Arbitration, consisting (except as hereinafter provided) of two Arbitrators, one to be nominated by the Company and one by the Agent and an Umpire to be chosen by the Arbitrators before entering into the arbitration. Should the Arbitrators be unable to agree as to the Umpire within thirty days of their appointment, each of them will forthwith name one and the decision will be made by drawing lots. NO one will be nominated or appointed an Arbitrator or Umpire under this Agreement unless he is a disinterested party.

B. Arbitration will be commenced by a written request from one party to the other to nominate an Arbitrator, and should either party fail to do so within thirty days of the receipt of such a request, then the nominee or the other party will constitute the Board of Arbitration without any Umpire.

C. The hearing of the Arbitration will take place, in such place as agreed upon, within one month after the constitution of the Board of Arbitration, and pursuant to the laws of state in which the Company's Headquarters are located which govern such arbitration. The Arbitrators will act at the earliest convenient

date and will submit to the Umpire only such questions upon which they disagree. A decision in writing of any two Arbitrators, when filed with the Company and the Agent, will be final and binding on the parties.

D. All Arbitrators shall interpret this Agreement as an honorable engagement rather than as merely a legal obligation; they are relieved of all judicial formalities and may abstain from following the strict rules of law. Their decision shall be made as soon as practicable, but no later than sixty days following termination of the hearings unless all parties to the dispute consent to an extension.

E. The Arbitrators will have power to call for any documents or other evidence and to examine witnesses on oath or otherwise and are relieved from any judicial formalities and may abstain from following the strict rules of evidence or procedure.

F. Each party will pay the fee of its own Arbitrator and half the fee of the Umpire or of the sole Arbitrator if there be not more than one, and the remaining cost of the Arbitration will be paid as the award shall direct.

XII. SERVICE OF SUIT CLAUSE

In the event that any dispute cannot be resolved to the satisfaction of either party by the foregoing arbitration procedure, the Agent, at the request of the Company, will submit to the jurisdiction of any Court of competent jurisdiction within the United States and will comply with all requirements necessary to give such Court jurisdiction and all matters arising hereunder shall be

determined in accordance with law and practice of such Court.

Agency-Company Agreement

Service of process in such suit may be made upon Mr. R. S. Faron of Lane and Mittendorf whose address is Suite 1200, 1750 K Street, N.W., Washington, D.C. 20006. In any suit instituted against the Agent upon this Agreement the Agent will abide by the final decision of such Court or of any Appellate Court in the event of an appeal.

The above-named are authorized and directed to accept service of process on behalf of the Agent in any such suit and/or upon the request of the company to give a written undertaking to the Company that they will enter a general appearance upon the Agent's behalf in the event such a suit shall be instituted.

IN WITNESS WHEREOF the Agent and the Company have caused this Agreement to be executed this *1st* day of *January*, 1983.

FOR THE AGENT	FOR THE COMPANY
1. BY *C.A. Mueller* ERAS (International), Limited	BY *Frank Kinnett*
TITLE *Managing Director*	TITLE *Vice-President*
WITNESS *Malcolm Aickin*	WITNESS *James M. Rogers*
DATE *26 May 83*	DATE *January 1, 1983*
2. BY *Ian Crawford Smith* Clarkson-Puckle Group	
TITLE *Director*	
WITNESS *Malcolm Aickin*	
DATE *26 May 83*	

ATTACHMENT A—UNDERWRITING, QUOTATIONS AND POLICY ISSUANCE

I. SUBMISSION

A. A submission is constituted by providing to the Agent enough information to prepare the premium indication requested.

B. All submissions will receive premium indications based upon the individual details of each submission.

C. In the event of multiple submissions, each submitting party will be advised of the existence of another submission. The nature of the submission and the terms and conditions indicated, or subsequent revisions, will not, however, be divulged.

D. Notwithstanding the above, on submission for premium indicators for accounts currently written in the ERAS facility, premium indicators will only be given to the holding broker or broker appointed as exclusive Agent or Record as respects Environmental Impairment Liability coverage including specific reference, with policy number, to the existing EIL policy.

II. UNDERWRITING

A. An Environmental Impairment intelligence system will be coordinated by ERAS, U.S.A. and checked by the Agent prior to quoting an account. This system will be contributed to and available to the Agent, the Company, ERAS, U.S.A., Environmental Resources Ltd., assignees under this agreement, and insurers and reinsurers who are involved with this coverage. This intelligence system will consist of:

1. A news clipping service for articles naming specific companies which have environmental impairment problems.
2. A subscription to the Environmental Reporter, maintained by ERAS U.S.A.
3. Input from Environmental Resources Ltd. on the worldwide perspective of environmental impairment.
4. Input from the parties involved regarding Federal and State regulatory activities.
5. Reports from the sales and engineering staffs of the parties involved, particularly for existing insureds or specific companies that have problems.

B. In addition to the check of the intelligence system above, discussions with ERAS, U.S.A. will include:

1. The cost of the survey.
2. The time required to complete the survey.
3. The advisability of binding prior to survey, and what terms to require if bound prior to survey.

C. Premium indications may be offered and willingness to bind prior to survey will be stated, depending on the outcome of the preceding discussions. Premium indications are the sum of the risk bearing premium, developed using the rating method, and the survey cost, grossed up to allow 27.5% deductions. The survey element need not be separated, unless binding prior to survey. If bound prior to survey the survey

costs plus 25% of the annual risk bearing premium must be designated as a minimum earned premium.

Prior to offering terms in a quotation any departure from standard policy or endorsement wording must be approved by the Company. The requirement of a signed EIL 881 proposal form dated not more than 30 days prior to the effective date, and the premium payment requirements should be part of the quotation. The name of the Company to be offered as security should be determined in accordance with this Attachment's section on binding and policy issuance.

Premium indications will be stated as valid for not more than 90 days.

D. ENGINEERING SURVEY

1. A contract letter will be issued by ERAS, U.S.A. and signed by the insured giving ownership of the survey to the insured.

2. When a survey is being done prior to binding ERAS, U.S.A. will charge the prospective insured 50% of the total fee in advance with the balance being collected by ERAS, U.S.A. after the completion of the survey.

3. Reimbursement of the engineering survey fee to the insured when coverage is purchased will be accomplished by including 100% of the engineering survey fee plus 27.5% deductions as a party of the total premium. Alternatively, the total premium may be reduced by excluding the engineer-

ing element from the premium and allowing no reimbursement.

E. BINDING PRIOR TO ENGINEERING SURVEY

1. Binding prior to the engineering survey will only be permitted if the terms of Endorsement EIL-881-10 are imposed.

2. In these cases a minimum earned premium must be specified and must be equal to 100% of the engineering survey fee grossed up to allow for 27.5% deductions, plus 25% of the annual risk bearing premium.

3. A Warranty of Premium payment in advance of binding is required.

4. The premium and terms offered in these cases should be conservative, with lower deductibles or improved terms being offered only when the survey is completed, reviewed and favorable.

5. Changes in coverage as a result of the survey must be signed and accepted by the insured.

F. RESOURCE CONSERVATION AND RECOVERY ACT—CERTIFICATES OF INSURANCE

These certificates will not be issued unless and until:

1. The premium has been paid.

2. The engineering survey has been completed.

3. The RCRA Certificate Endorsement (EIL-881-40) has been signed as accepted by the insured.

4. Full information is furnished on the sites to be certified (EPA numbers, etc.) including the EPA regions to receive the certificates.

5. Limits of $2,000,000 each claim and $4,000,000 aggregated in excess of the limits to be certified must be carried.

Notice of cancellation will be sent to the EPA regions 75 days in advance of the renewal date unless a renewal order and premium payment has been received.

G. RENEWAL

A restatement of the answer to question four on the application is required, dated not more than 30 days prior to the date the renewal coverage is ordered. In addition to the underwriting considerations in II A, II B, and II C of this attachment, consideration will be given to requiring surveys prior to offering renewal terms. Survey element costs will be included in the renewal premium per II C.

III. BINDING AND POLICY ISSUANCE

A. The Agent shall secure the approval of the lead reinsurer(s) in all situations not included in the mutually approved underwriting procedures, other than incidental working amendments required for an individual risk, which shall be approved by the Company.

B. The Agent shall confirm the terms of each binder in writing or by telex/cable to the producing broker. This confirmation shall contain the following minimum information:

1. Name of the insured
2. Locations covered
3. Limits of liability
4. Deductibles
5. Effective date
6. Coverage form number
7. Premium payment warranties
8. Endorsements applicable, including wordings if not standard.

C. The Agent shall advise the Company of its wish to bind a policy. The Company shall advise the Agent within one working day of receipt of such advice whether or not it is willing to bind such a policy.

D. Within 10 days of the binding date of each policy bound under this Agreement the Agent will advise the Company by telex the following information:

1) Name and address of Insured
2) Effective date of coverage
3) Limits of liability
4) Premium
5) USA Producing Agent (including location)
6) USA Wholesaler (if any, including location)

E. Within 20 days of the binding date of each policy the Agent will forward two copies of each policy to the Company.

F. Upon receipt of the binding telex, the Company shall advise the Agent whether or not the USA Producer can provide his own countersignature. If not, the following countersignature procedures *must* apply:

1. The original and two copies of each policy will be sent to The London Agency, Atlanta, an affiliate of International Insurance Company. The name and address of the USA producing agent, and the commission payable must be included. Upon completion of the countersignature procedure the original policy will be mailed to the USA agent.

2. The USA producer *must* be either a licensed resident or nonresident agent in the Insured's home stat (the address shown in the Declarations). If a nonresident, the nonresident license number must be furnished with the original policy.

3. In the majority of states countersignature can be provided free of cost. Some states require a fee (usually 5% of premium or 50% of commission, whichever is less) be paid to the countersigning Agent. These fees, if applicable, will be paid by the Company to the countersigning Agent and must be reimbursed by the Agent (i.e.—a reduction in commission to the producing agent will apply).

Note: If the USA producer is a wholesale broker either he *or* his producing agent can be the holder of the resident or nonresident license. In this case, The London Agency, Inc. must know the name and address of both the Wholesaler and his Producer. The following or similar format to be used in presenting the needed information:

Insured:
Address:

USA Producer:
Address:

USA Wholesaler: (If applicable)
Address:

Nonresident License No.: _____ (If applicable)

License is ____ Producer's ____ Wholesaler's

G. In states where International Insurance Company is prohibited from providing Environmental Impairment Liability, the facilities of International Surplus Lines Insurance Company may be utilized. This does not apply to New York which has not yet authorized International Insurance Company or International Surplus Lines Insurance Company to issue coverage. In such cases, the following provisions will apply in lieu of Item E.3. above:

1. ISLIC must be used in any state:
   a. Which has not approved International Insurance Company's policy filing, or
   b. where the USA producer does not meet the licensing requirement of E.2.
2. The provision of E.1. must be followed since the Company must sign the original policy as the authorized representative.
3. These policies are subject to surplus lines filings. Therefore, the name, address and surplus line license number of the USA Agent responsible for making the filing must also be included.

H. The Agent may cancel coverage by receiving a lost policy release or the original of the policy from the insured. Notification to the Company of such cancellation will be by telex within 10 days of the effective date of such cancellation.

If the Agent wishes to originate cancellation, the Agent must ask the Company to send Direct Notice of Cancellation to the insured.

ATTACHMENT B—PREMIUM ACCOUNTING

1. Within 20 days following the end of each month the Agent will provide a bordereau to the Company to include name and policy number of each risk bound during the previous month, limits of liability, gross premium, reinsurance premium and any special charges applicable (e.g. engineering fees, countersignature fees, etc.). The bordereau will identify whether each transaction was a new policy, a renewal policy, premium endorsement or cancellation.

2. The net premium plus all special charges shall be paid to the Company within 120 days of the close of the month of the bordereau.

The London Agency, Inc.

ATTACHMENT C—CLAIMS PROCEDURE

I. Each policy shall contain instructions to report all claims or incidents to:

A. Mr. Richard Power
ERAS Claims Division
6 Commerce Drive
Cranford, NJ 07016
Telephone: (201) 272-2500
Telex: 46-9009

B. Mr. Reuel Buttram
International Insurance Company
c/o The London Agency, Inc.
P.O. Box 4985
Atlanta, GA 30302
Telephone: (404) 875-9641
Telex: 54-2445

II. ERAS Claims Division will notify the Company and the Agent within 10 days of the receipt of each claim or incident. The Company or Agent will likewise notify ERAS Claims Division of any claim or incident reported to the Company or Agent.

III. The Agent via ERAS Claims Division will be responsible for:

A. Opening and maintaining a complete claim file, including a copy of the policy, proposal form, engineering survey and underwriting file, as necessary.

B. Acknowledge notifications of claims or incidents to the insured or broker from whom notice was received and giving appropriate instructions to them for handling the claim or incident.

C. Negotiation and settlement of claims including payment of expenses and costs incurred on behalf of the Company, including obtaining appropriate releases.

D. A quarterly review of each outstanding claim or incident file to establish the adequacy of reserves and future action to be taken.

E. Keeping the Company advised of all important developments on all claims.

F. Payments of claims from funds held, with supporting documentation for each payment to be maintained.

G. In the event of settlements exceeding $100,000, to make a special call for funds from the Company and reinsurers, in accordance with the terms of the reinsurance treaties.

NOTE: The Company retains the right in all cases, upon notifying the Agent in writing, to assume charge of the defense and/or settlement of any claim. In such event the Agent shall assist and cooperate with the Company. The Agent is encouraged to consult with the Company for advice and recommendations on any claim.

IV. Claims Bordereau

The Agent will prepare a bordereau for

A. Claims advised and outstanding and

B. Claims Paid

on a quarterly basis, on the agreed format, and will send them to the Company on a quarterly basis, within 20 days of the end of each quarter.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

INTERNATIONAL INSURANCE COMPANY, Plaintiff, v. CERTAIN UNDERWRITERS AT LLOYD'S LONDON, et al., Defendants.	No. 88 C 9838
KEITH KERR, et al., Counter-plaintiffs, v. INTERNATIONAL INSURANCE COMPANY, Counter-defendant.	Judge Lindberg Magistrate Judge Weisberg
INTERNATIONAL INSURANCE COMPANY, Counter-defendant/Third-party plaintiff, v. SOCIETE COMMERCIALE DE REASSURANCES S.A., et al., Third-party defendants.	

Magistrate Judge's Report and Recommendation on Clarkson Defendants' Motion to Stay Pending Arbitration

This suit arose from the attempt of an insurer, International Insurance Company (IIC), to compel certain reinsurers to reimburse it for payments made in settlement of an insurance claim brought by SmithKline Beckman (SKB) under an environmental impairment liability (EIL) policy issued by IIC. The defendant reinsurers have counterclaimed against IIC, claiming it breached implied covenants in its reinsurance treaties with them, induced them to par-

ticipate in the reinsurance program through fraudulent misrepresentations, and mishandled the SKB claim. The counterclaim also alleges that IIC and other committed acts of racketeering subjecting IIC to liability under the Racketeer Influenced and Corrupt Organizations Act (RICO).

IIC insists that it was only the nominal insurer, "fronting" for an international pool of reinsurers who sought to compete in the U.S. EIL market and were to assume virtually the entire risk. IIC has filed a third-party complaint against the alleged organizer of the pool, Societe Commerciale de Reassurance S.A. (SCOR), a French corporation, and the alleged pool manager, four U.K. corporations which the third-party complaint refers to without differentiation as "Clarkson." The corporations are The Clarkson Puckle Group, Ltd. (CPG), ERAS (International), Ltd. [standing for Environmental Risk Assessment Service] (ERAS), Clarkson Puckle International Reinsurances, Ltd. (CPIR) and Bain Clarkson, Ltd, (BC). IIC alleges that they "acted without respecting their separate corporate identities." Third-Party Complaint ¶3. IIC also filed a Second Amended and Supplemental Complaint (Complaint) in which it makes direct claims against Clarkson and SCOR.

IIC's relationship with the EIL pool is reflected in two agreements with CPG (the Agency-Company Agreements or A-C Agreements) which appointed CPT as IIC's agent with respect to soliciting business, collecting premiums, processing claims and procuring reinsurance. The first A-C Agreement was dated November 4, 1982 and the second was dated January 1, 1983. Third-Party Complaint Exhs. A, B. The heading of the second A-C Agreement states that it "replaces" the first. We understand this to mean that the second A-C Agreement was to govern the par-

ties' relationship after January 1, 1983. Thus the provisions regarding indemnification and dispute resolution found in the second A-C Agreement are to control in disputes arising after January 1, 1983 even if based on transactions originally governed by the first A-C Agreement. Since these are the provisions in question here, we will use "Agreement" to mean the second A-C Agreement unless otherwise indicated.

In Art. VIII of the Agreement, CPG agreed to defend and indemnify IIC against any "claims or liabilities based on any actual or alleged bad faith or negligence of the Agent [CPG] when such bad faith or negligence arises our of or is alleged to have arisen out of the processing or handling of business under this Agreement or any actual or any alleged failure of the Agent to comply with the terms and conditions of this Agreement."[1] Both A-C Agreements have provisions requiring arbitration of disputes.

In Count I of the Third-Party Complaint IIC seeks indemnification from Clarkson under the A-C Agreements for any judgment against it on the counterclaim for conduct attributable to Clarkson's negligence, bad faith or errors in the processing or handling of business under the A-C Agreements. Count II alleges that Clarkson was acting as an agent of SCOR, rendering SCOR also liable for

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[1] In the first A-C Agreement CPG agreed to indemnify IIC against "any claims or liabilities the Company [IIC] may become obligated to pay based on any actual or alleged error of the Agent [CPG] in the processing or handling of business placed under this Agreement or on any actual or alleged failure of the Agent to comply with the terms and conditions of this Agreement." While the first Agreement only requires CPG to indemnify IIC after IIC becomes obligated to a third person, the second requires CPG to *defend* IIC prior to a finding of liability.

the foregoing. In Count III IIC seeks indemnification from SCOR under a March 11, 1988 claims handling agreement in which SCOR agreed to hold IIC harmless with respect to SCOR's handling of claims thereunder. IIC also seeks reimbursement of defense costs from Clarkson and SCOR.

In its direct claims against Clarkson in the Complaint, IIC seeks indemnification under the Agreement (Count XI). IIC alleges that Clarkson breached its promise in the Agreement to provide reinsurance for IIC on certain terms and conditions (Count XII) and that it breaches its fiduciary duty as IIC's agent in failing to disclose material information regarding the EIL program (Count XIII).

The Clarkson defendants have moved the court to stay proceedings against them, invoking the arbitration provisions in the A-C Agreements.[2] In briefing this motion the parties have not distinguished among the Clarkson entities named as defendants, and for the purposes of this motion we will not do so either. The motion has been referred to the undersigned for report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(b).[3]

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[2] CPIR and BC moved for a stay in the alternative in the event their Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction is denied. Their Rule 12(b)(2) motion was subsequently withdrawn as to BC and has been stayed pending discovery as to CPIR.

[3] Because a stay pending arbitration is considered final for purposes of appeal, *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 8-13 (1983), this is a dispositive motion even though it does not correspond to any of the exceptions listed in 28 U.S.C. § 636(b)(1)(A).

The Federal and Illinois Arbitration Acts

The Federal Arbitration Act (FAA) was originally enacted in 1925 and now constitutes Title 9 of the United States Code. Its purpose was to reverse the longstanding judicial hostility to arbitration agreements at English common law and in American courts, and to place arbitration agreements upon the same footing as other contracts. *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219-220 (1985). Its primary substantive provision stated that "[a] written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The FAA also provides for stays of proceedings in federal district courts when an issue in the proceeding is referable to arbitration, § 3, and for orders compelling arbitration when one party has failed, neglected, or refused to comply with an arbitration agreement, § 4. These provisions manifest a "liberal federal policy favoring arbitration agreements." *Moses H. Cone*, 460 U.S. at 24. Clarkson invokes § 3 of the FAA:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

This language is unequivocal and "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute" a court has no discretion and must refer the matter to arbitration. *Morrie Mages and Shirlee Mages Foundation v. Thrifty Corp.*, 916 F.2d 402, 406 (7th Cir. 1990). The FAA requires a stay and a referral to arbitration when there are *issues* subject to arbitration, whether or not all parties to the pending suit are obliged to arbitrate. *Id.* at 406-07.

Illinois law is also applicable because the Agreement calls for the application of the law of the state in which IIC's headquarters is located, *i.e.*, Illinois. Where the agreement to arbitrate calls for the application of state law, a federal court should apply it unless it is inconsistent with the goals and policies of the FAA. *Volt Information Sciences v. Stanford University*, 489 U.S. 468, 478-79 (1989). The Illinois Uniform Arbitration Act, Ill. Rev. Stat. ch. 10 ¶ 101 *et seq.*, (1989) is similar to the FAA, and Illinois cases interpreting it have also followed a policy of favoring arbitration. For the purposes of the present motion, we see no significant difference between federal and Illinois law.

Is Arbitration Optional?

IIC does not contest the validity or the enforceability of the agreement to arbitrate, not does it attempt to separate the issues in this case into those that are properly referable to arbitration and those that are not. IIC argues that the unique arbitration provisions in the Agreement make arbitration optional rather than mandatory and that Clarkson has waived its right to arbitration by instituting litigation against IIC in London.

If arbitration is optional the court should not order it. As the Supreme Court has put it, "[the FAA] does not confer a right to compel arbitration of any dispute at any time; it confers only the right to obtain an order directing that 'arbitration proceed *in the manner provided for in [the parties'] agreement*'." *Volt Information Sciences*, 489 U.S. at 474-75 (emphasis in original). The arbitration provisions of the Agreement read in pertinent part:

XI. *ARBITRATION*

A. All disagreements which may arise under this Agreement between the parties hereto shall be referred to the decision of a Board of Arbitration, consisting (except as hereinafter provided) of two Arbitrators, one to be nominated by the Company and one by the Agent and an Umpire to be chosen by the Arbitrators . . . .

B. Arbitration will be commenced by a written request from one party to the other to nominate an Arbitrator, and should either party fail to do so within thirty days of the receipt of such a request, then the nominee or [sic; probably should be *of*] the other party will constitute the Board of Arbitration without any Umpire.

C. The hearing of the Arbitration will take place, in such place as agreed upon , . . . pursuant to the laws of the state [sic] in which the Company's Headquarters are located which govern such arbitration. The arbitrators will act at the earliest convenient date and will submit to the Umpire only such questions upon which they disagree. A decision in writing of any two Arbitrators, when filed with the Company and the Agent, will be final and binding on the parties.

* * * *

XII. *SERVICE OF SUIT CLAUSE*

> In the event that any dispute cannot be resolved to the satisfaction of either party by the foregoing arbitration procedure, the Agent, at the request of the Company, will submit to the jurisdiction of any Court of competent jurisdiction within the United States and will comply with all requirements necessary to give such Court jurisdiction and all matters arising hereunder shall be determined in accordance with the law and practice of such Court.

Third Party Complaint Exh. B at 2-3.

IIC contends that Art. XII renders arbitration optional. The language is unusual, but a court should proceed on the assumption that the contracting parties intended a consistent agreement and give effect to all of its terms if possible.

The Agreement states that disputes "shall" be arbitrated. It also states that a decision of the arbitrators will be final and binding on the parties. It further states that if one party declines to nominate an arbitrator, the other party's nominee may proceed to decide the case. These are all inconsistent with a construction holding that either party has the right to decline arbitration.

But what are we to make of Art. XII? In the vent that any dispute cannot be resolved to the satisfaction of either party by arbitration, Clarkson agrees to submit to the jurisdiction of a United States court and "and all matters arising hereunder shall be determined in accordance with the law and practice of such Court." Does this mean that if one of the parties is dissatisfied, the court shall try the issues *de novo*? Even if this were the case, it would not be grounds for denying Clarkson's motion, since the Agreement at least requires the parties to attempt arbitration first.

We reject IIC's interpretation since it would be contrary to the concept of arbitration itself. The parties agreed on arbitration; arbitration is a familiar concept and we may presume the parties knew what it means. Unlike mediation, arbitration is a private adjudication, a binding determination by a third person; an arbitration in which either party is free to reject the award is not an arbitration.

It is more reasonable to suppose that in agreeing that "all matters arising hereunder shall be determined in accordance with the law and practice of such Court" the parties meant that if either party was dissatisfied it could petition the court for review, and the court would then confirm, modify or set aside the award in accordance with applicable law. Art. XII merely established that IIC could choose which court. The heading of this paragraph, "Service of Suit Clause," supports this interpretation of the provision as essentially a consent to jurisdiction. We conclude that arbitration is not optional and this objection to Clarkson's motion must fall.

Has Clarkson Waived its Right to Arbitration?

Like other contractual rights, the right to demand arbitration of disputes can be waived. Given the strong state and federal policy favoring arbitration, waiver will not lightly be inferred. *Mages*, 916 F.2d at 405; *Edward Electric Co. v. Automation, Inc.*, 164 Ill. App. 3d 547, 115 Ill. Dec. 647, 652, 518 N.E.2d 172, 177 (1st Dist. 1988). In *TDE Ltd. v. Israel*, 185 Ill. App. 3d 1059, 133 Ill. Dec. 843, 848, 541 N.E.2d 1281, 1286 (1st Dist. 1989), the court stated that "[w]aiver of a contractual right to arbitration occurs when a party's conduct is so inconsistent with the arbitration clause as to demonstrate abandonment of that

right." See also *Mages*, 916 F.2d at 405 (the crucial question is whether under the circumstances the defendant acted inconsistently with the arbitration right; prejudice suffered by the objecting party should be considered).

IIC says that Clarkson waived its right to insist on arbitration by naming it and its agent and affiliate The London Agency, Inc. (TLA) as third-party defendants in certain suits pending in London relating to the EIL reinsurance program. Clarkson replies that these suits (a) did not involve claims based on the A-C Agreements and thus were not waivers of their arbitration provisions; (b) were filed only to protect Clarkson against the running of the status of limitations; and (c) have caused IIC no prejudice. Both parties have submitted documents filed in the London litigation. Since waiver is, in effect, an affirmative defense to a *prima facie* obligation to arbitrate, the arguments and affidavits offered on this issue commence with IIC's brief in opposition to the motion, to which Clarkson responded in its reply brief and in the affidavit (with exhibits) of its solicitor, Wiliam Munro Rodger, dated July 18,1991 (cited as Rodger Opp. Aff.). As a consequence, IIC did not have (and did not seek) an opportunity to reply to Clarkson's response.

On the first issue, whether Clarkson's claims in the London litigation arose under the Agreement, both sides are correct. Clarkson originally stated that its claims against IIC arose, at least in part, from the A-C Agreements and were thus presumptively arbitrable. Nevertheless, as discussed below, Clarkson later dropped its reliance on the A-C Agreements and we find that its claims do not in fact arise under them.

A Writ of Summons dated February 3, 1989 and issued against TLA states that various Clarkson entities (includ-

ing the third-party defendants here) have brought suit against TLA for

> Damages for breach of contract and/or negligence and/or breach of duty arising out of written and/or oral contracts made in or about November 1983 and/or January 1983 and/or 1st October 1983 in respect of the operation and/or management of an environmental impairment liability risks programme and/or reinsurance pool of environmental impairment liability risks, including, without limitation, the promotion, underwriting, claims handling and retrocession of such programme.

1989 Folio 233 Q.B. Division, Commercial Court, IIC Br. Exh. A. IIC points to the November 1982 and January 1983 dates, corresponding to the A-C Agreements, and Clarkson acknowledges that the A-C Agreements were meant. Rodger Opp. Aff. ¶ 4.

However, Clarkson's Points of Claim (corresponding to the complaint in our procedure) dated April 11, 1990, Rodger Opp. Aff. Exh. A, make it clear that its claims do not arise under the A-C Agreements, but from a separate claims handling agreement entered into in September 1983. This is consistent with IIC Br. Exh. B, an affidavit of Mr. Rodger as solicitor for "the Clarkson defendants,"[4] filed in another London suit designated 1987 Folio 791, in which Clarkson seeks leave to add a claim against TLA. Rodger makes apparent reference to the foregoing Writ of Summons, and states that at the time it was filed he had no evidence of a contract between Clarkson and TLA. He then states that in November 1989 he became aware

[4] It is not clear which entities are referred to by Mr. Rodger as "the Clarkson defendants." We will refer to them as "Clarkson" here with the understanding that the word may not denote the same entities as the parties to this suit.

of such a contract. He states that on or about September 1, 1983 TLA undertook for Clarkson to handle all claims against IIC arising out of the EIL insurance program. This claims handling function had previously been performed by Alexander Howden Insurance Services (AHIS), and it was agreed that TLA would receive the same compensation as had been paid to AHIS.

The "Amended Third Party Notice" dated July 3, 1990 and amended October 12, 1990, issued in a suit designated as 1988 Folio No. 1722 between SCOR as plaintiff and eleven Clarkson affiliates as defendants, IIC Br. Exh. C, which adds IIC as an additional third-party defendant, also refers to an alleged oral agreement made in September 1983 between some or all of the Clarkson Defendants and IIC. The Notice states that Clarkson complains that IIC breached a September 1983 EIL claims handling agreement, was negligent in handling EIL claims in 1982 and 1984 and breached duties of good faith, skill, diligence and care with respect to the handling of claims and the underwriting of risks, all for the "1982 to 1984 years of reinsurance in the environmental impairment liability reinsurance programme."

Although IIC disputes the existence of this agreement, IIC Br. at 5, the materials it has provided are consistent with Clarkson's position that the claims against IIC and TLA arose out of a separate agreement between TLA and Clarkson. They are also consistent with the statement by Clarkson's counsel, Mr. Rodger, that Clarkson regarded TLA and IIC as separate entities, and entered into the oral claims handling agreement with TLA as principal. According to Rodger, Clarkson only sought to joint IIC after IIC's counsel declared that TLA had been acting solely as IIC's agent. See Rodger Opp. Aff. ¶¶ 6-8. Clarkson's position is also supported by ¶ 21 of an affidavit of *TLA's*

counsel, David Alastair Fraser, in the London litigation dated April 12, 1990, Rodger Opp. Aff. Exh. D, referring to a written agreement dated October 6, 1983 between AHIS and TLA, *id.* Exh. C, providing for the transferring of claims handling responsibility from AHIS to TLA. Finally, Mr. Justice Waller of the Commercial Court held that Clarkson had a "good arguable case" against TLA and IIC based on this alleged contract. See Rodgers Opp. Aff. Exh. F at 27-29.

It is reasonably clear that in the London litigation Clarkson is not alleging that IIC breached duties under the A-C Agreements, but is alleging a breach of a subsequent agreement by which TLA undertook claims handling that had been the responsibility of Clarkson or its designee, AHIS. Although in the "Amended Third Party Notice" IIC is named as a defendant, liability appears to be predicated solely on the acts of IIC's alleged agent, TLA, which had no role under the A-C Agreements. See also Rodger Aff. dated [illegible] June, 1990, IIC Br. Exh. D at ¶¶ 6, 7; Rodger Aff. dated July 25, 1990, IIC Br. Exh. E at ¶¶ 12-15.

IIC argues that even if Clarkson delegated claims handling to TLA in a separate contract, any dispute between Clarkson and TLA would still be subject to the arbitration provisions of the Agreement because the delegation was of claims handling duties which Clarkson had under the A-C Agreements and concerned the subject matter of those agreements. IIC may be correct. However, we need not decide that question in order to determine whether a waiver has occurred; the question is whether Clarkson's actions are inconsistent with an intention to arbitrate. If Clarkson can show that the claims it asserted in the London litigation were arguably not arbitrable, we should be

reluctant to find a waiver when the claims IIC has asserted here clearly *are* arbitrable.[5]

IIC cites *Consumer Concepts, Inc. v. Mego Corp.*, 458 F. Supp. 453 (S.D.N.Y. 1978), in which a license and licensor had an umbrella agreement providing that the licensor would offer the licensee ideas for toys; if the license accepted an idea it would be incorporated into their agreement. The agreement contained a broad arbitration clause that provided that "[a]ny controversy or claim arising out of or relating to this agreement or the breach thereof, shall be settled by arbitration." *Id.* at 544. The parties entered into a separate confidentiality agreement in connection with their negotiation concerning an idea for a particular toy in which the licensee agreed that if no agreement was reached by November, 1975 it would not disclose the idea or make toys based on it until 1979.

The licensor sued for an alleged breach of the second agreement, and the licensee demanded arbitration. The court ordered a stay pending arbitration, although the second confidentiality agreement had no arbitration provision, because it found the second agreement supplemented the master agreement and could not be read apart from it. *Id.* at 545.

The situation here is quite different. The A-C Agreement requires only arbitration of "disagreements which may arise under this Agreement," in contrast to the first A-C Agreement which required arbitration of "[a]ny controversy or disagreement arising out of or relating to this

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[5] We emphasize that these conclusions are made upon limited evidence and in part rest on IIC's heavy burden of showing waiver. IIC is free to claim in the London proceedings that its dispute with Clarkson there is arbitrable, and any determination made by this court in deciding this motion to stay should not be deemed to make that issue *res judicata*.

Agency-Company Agreement or transactions contemplated hereby." Because the two A-C Agreements are dated only two months apart, the parties would have been fully aware of the provisions of the first when they replaced it with the second, and we read this as an intentional narrowing of the scope of the arbitration provision. Arguably the transfer of claims handling responsibility to TLA was "related to" the Agreement (although it does not appear to be "contemplated by" it), but a dispute relating to such a transfer does not, we believe, arise "under" the Agreement and hence is not covered by the arbitration provision of the Agreement.

Further, the delegation of claims handling responsibility to TLA was not part of the dealing between the parties anticipated by the Agreement, unlike *Consumer Concepts*. Under the Agreement Clarkson (ERAS) could delegate its claims handling obligations with IIC's consent, but there is no reference in the Agreement to TLA or IIC's assuming them. At the time it entered into the Agreement and thereafter Clarkson apparently delegated them to AHIS, an unrelated party, which is consistent with our conclusion that claims handling by TLA was not contemplated by the A-C Agreements.

In the London suits, Clarkson alleges that TLA took over the claims handling function with respect to claims against IIC's policies on the same terms as AHIS.[6] IIC

[6] IIC alleges that Clarkson has ignored an arbitration agreement with Howden, by which it apparently means AHIS. IIC Br. at 6, n.3. However, even if TLA somehow assumed AHIS's claims handling agreement with Clarkson and thereby became obligated to arbitrate disputes arising thereunder, this obligation would not arise under the A-C Agreements. IIC has offered no authority for the proposition that refusal to arbitrate disputes arising under one agreement is a waiver of the right to compel arbitration under another one.

has offered no reason to suppose that because TLA was an affiliate of IIC, when Clarkson contracted with TLA its agreement automatically incorporated a promise made by IIC to arbitrate its disputes with Clarkson. TLA and IIC are separate legal entities. Why should this second contract have incorporated the arbitration provisions of the A-C Agreement if it was the same arrangement Clarkson had with AHIS, which was not a party to the A-C Agreement? Clarkson had convincingly demonstrated that the claims it asserted against IIC in the London litigation arose from a claims handling agreement which contained no agreement to arbitrate. IIC, which has the burden of showing waiver, has not shown that the arbitration provisions of the A-C Agreement apply to this second agreement.

Did Clarkson's initial reference to the Agreements in its February 3, 1989 Writ of Summons constitute an unambiguous election of litigation over arbitration even though it turns out that its claims are not arbitrable? We think not. As Clarkson has pointed out, the initial Writ was against TLA alone. While it is true that one cannot avoid arbitration by suing the agent of the party with whom one has agreed to arbitrate, Clarkson had reason to suppose that it was dealing with TLA as principal in entering into the claims handling agreement, even though it surely knew that TLA and IIC were affiliated entities.[7] The claims handling agreement applied to IIC's policies written pursuant to the A-C Agreements, and the author-

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[7] Clarkson even now questions whether TLA was IIC's agent for purposes of claims handling, pointing to an Agency Agreement dated January 1, 1973 between IIC and TLA which authorizes TLA to bind coverage and accept premiums but is silent as to claims handling. Rodger Opp. Aff. Exh. E.

ity to delegate claims handling responsibilities to TLA also came from the A-C Agreements, so mention of the A-C Agreements was not out of place in the Writ. But the language of the Writ, "breach of contact and/or negligence and/or breach of duty arising out of written and/or oral contracts . . ." is vague even by this country's pleading standards, and until TLA or IIC was served with the Points of Claim it would not know what specific claims Clarkson was asserting, much less whether they were arbitrable.

Clarkson also says that the third-party claims were filed against TLA and IIC only to protect against the running of the statute of limitations. Clarkson Br. at 10-11; Rodger Opp. Aff. at ¶ 4. IIC has not responded to this contention. This is an element to be considered, although it has little significance in view of our finding that the claims would (probably) not toll the statute of limitations, and Clarkson should have the right to protect itself by filing suit and then asking for a stay pending arbitration. Presumably Clarkson determined that its claims did not arise under the A-C Agreements and did not ask for a stay.

Finally, we come to the element of prejudice. Although prejudice is an element to be considered, we do not believe a showing of prejudice is an absolute requirement. *Midwest Window Systems v. AMCOR Industries, Inc.*, 630 F.2d 535, 537 (7th Cir. 1980), stated that all circumstances must be considered, and prejudice should be one of them, a position followed by *Mages*, 916 F.2d at 405. If we are correct that the claims made in the London litigation against IIC were not arbitrable, IIC suffered no prejudice from being sued.

After considering all of the circumstances, we conclude that IIC has not shown that Clarkson waived its right

to have disputes arising under the Agreement resolved through arbitration.

Conclusion

We conclude that IIC's obligation to arbitrate disputes arising under the Agreement is not optional and that Clarkson has not waived its right to arbitrate. We accordingly recommend that the motion of the Clarkson defendants to stay proceedings pending arbitration be granted, and that the parties be ordered to proceed to arbitration in accordance with the arbitration provisions of the Agreement.

The parties are allowed 20 days from the date of service hereof to file written objections to this Report and Recommendation with Judge Lindberg. 27 U.S.C. § 636(b)(1), Fed. R. Civ. P. 6(b). Failure to file such objections will normally waive the right to appeal the rulings set forth in this Report. *Egert v. Connecticut General Life Ins. Co.*, 900 F.2d 1032, 1039 (7th Cir. 1990).

Respectfully submitted,

Bernard Weisberg
United States Magistrate Judge

Date: December 2, 1991

cc: All Attorneys of Record
(See Attached Service List)

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

INTERNATIONAL INSURANCE COMPANY, Plaintiff, v. CERTAIN UNDERWRITERS AT LLOYD'S LONDON, et al., Defendants.	No. 88 C 9838
KEITH KERR, et al., Counter-plaintiffs, v. INTERNATIONAL INSURANCE COMPANY, Counter-defendant.	Judge Lindberg Magistrate Judge Weisberg
INTERNATIONAL INSURANCE COMPANY, Counter-defendant/Third-party plaintiff, v. SOCIETE COMMERCIALE DE REASSURANCES S.A., et al., Third-party defendants.	

Magistrate Judge's Ruling on Motion of Clarkson Defendants For Protective Order ana for an Extension of Time to Plead

Defendants and third-party defendants, The Clarkson Puckle Group, Ltd., ERAS (International), Ltd., Clarkson Puckle International Reinsurances, Ltd. and Bain Clarkson, Ltd. (collectively the Clarkson defendants), have moved for a stay of proceedings against them pending arbitration (the Arbitration Motion), and certain of them have also moved to dismiss for lack of personal jurisdiction. In connection with these motions the Clarkson defendants

moved on June 10, 1991 for a protective order staying all discovery and extending their time to plead until the Arbitration Motion and motions to dismiss were decided. All of these motions were referred to this court for a ruling pursuant to 28 U.S.C. § 636(b)(1)(A).

While the last motion was briefing, on August 1, 1991 this court stayed discovery pending rulings on motions to dismiss, motions to stay pending arbitration, and determining whether the presence of the Lloyd's reinsurers destroyed federal diversity jurisdiction. This, in effect, granted the motion with respect to a stay of discovery pending ruling on the Arbitration Motion and certain Clarkson defendants' motion to dismiss. The motion for an extension of time to plead was unopposed and will be granted.

Our ruling would end here except that in their memoranda the parties argued an issue not raised in the motion itself, namely, what discovery obligations the Clarkson defendants should have in the event they proceed to arbitration with IIC. In their initial brief dated July 23, 1991 the Clarkson defendants took the position that arbitration might render their participation in the discovery process unnecessary. This was hotly disputed by both IIC and the reinsurers. In their reply, the Clarkson defendants then modified their position, stating that as to IIC they should only be required to give discovery to the extent ordered by the arbitrators under Section 7 of the Federal Arbitration Act, and as to the defendant reinsurers discovery should proceed as if the Clarkson defendants were not parties.

This is a different motion from the one actually filed, which only addressed the period of time up to rulings on the Arbitration Motion and motions to dismiss. On De-

cember 20, 1991 the court entered its Report and Recommendations on the Arbitration Motion, recommending that it be granted and all claims by IIC against the Clarkson defendants be stayed pending arbitration. If this recommendation is adopted, the court will have to address the additional issue discussed in the briefs, although not raised in the motion. Only one of the Clarkson defendant, Bain Clarkson Ltd., continues to challenge personal jurisdiction, so there is no prospect that *none* of the Clarkson defendants will remain parties.

The court could defer ruling until after Judge Lindberg adopts or rejects the recommendation on the Arbitration Motion, or require a new motion and briefing. However, both IIC and the reinsurers submitted their briefs after the court's ruling of August 1, and recognized that the issue had become what Clarkson's discovery obligations should be if proceedings are stayed pending arbitration. Neither has sought to file a surreply. Accordingly we treat the motion as having been amended with the consent of the parties. Since a ruling on the motion can take effect immediately upon the entering of a stay pending arbitration (unless modified or set aside under Rule 72(a)), in the interest of saving time the court will rule on the motion now.

We begin by noting that at least three of the Clarkson defendants are parties to this action whether or not arbitration is ordered. As parties they have obligations under the Federal Rules to provide discovery. Under Rule 26(c) the court "for good cause shown" "may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." The burden of showing good cause is, of course, upon the moving party. *Schachar v. American*

Academy of Ophthalmology, Inc., 106 F.R.D. 187, 190 (N.D. Ill. 1985) (Getzendanner, J.).

The Clarkson defendants' original position, that their participation in discovery may be rendered wholly unnecessary if IIC's claims are ordered to arbitration, Clarkson Def. Br. at 4, is untenable. The reinsurers have filed a broad counterclaim against IIC, alleging, among other things, that IIC committed fraud, mismanaged claims, engaged in negligence underwriting, and breached it contractual duties. They allege that the Clarkson defendants, or some of them, were IIC's agents and material participants in the conduct complaint of. The testimony of the Clarkson defendants' employees and records from their files will be essential to the adjudication of the counterclaim, which has not, of course, been referred to arbitration.

Furthermore, the Clarkson defendants may have evidence relevant to IIC's claims against the reinsurers, since one or more of them appears to have organized the reinsurance arrangement IIC seeks to enforce. What Clarkson told—or did not tell—the reinsurers will probably be material to the interpretation and enforceability of the reinsurance treaties. Thus, even if they were not parties, the Clarkson defendants would be subject to third party discovery, and even dismissal would not justify a complete stay of discovery as to them.

The Clarkson defendants raise the point that ordinarily discovery is stayed pending arbitration except as may be ordered by the arbitrators, and the court should permit discovery only in extraordinary circumstances. Having chosen arbitration, with its more limited discovery tools, they say, the parties should normally not be allowed to use the more expansive (and expensive) federal arsenal.

But here the dispute between IIC and the Clarkson defendants is not the entire suit; it is appended to dispute between IIC and its reinsurers, which neither of them is required to arbitrate. Since at least some of the Clarkson defendants were key players in the EIL program, to limit IIC's discovery against the Clarkson defendants to what the arbitrators might allow would be fundamentally unfair for two reasons.

First, there is little or no discovery in arbitration. For the reasons stated in our Report and Recommendation on the Arbitration Motion, the Illinois Uniform Arbitration Act, Ill. Rev. Stat. ch. 10, ¶ 101 *et seq.* (1989), rather than the Federal Arbitration Act, 9 U.S.C. § 101 *et seq.*, will govern the arbitration. The Illinois statute permits depositions to be taken only when a witness will not be available to testify at the hearing. Ill. Rev. Stat. ch. 10 ¶ 107. Second, the arbitrators might well take the position that they are empowered only to order discovery with respect to the dispute before them. This court leave IIC unable to obtain discovery with respect to much of its dispute with the reinsurers.

It might be possible to separate the issues with respect to which discovery is sought, and permit IIC only arbitrator—authorized discovery with respect to evidence relating to arbitrable issues. However, Rule 25(b)(1) is a very blunt knife to make such a division, and it takes little imagination to realize the likely consequences—disputes about the scope of discovery on both sides, and double depositions of witnesses. As with the proverbial judgment of Solomon, an attempt to divide the matter rationally would cause more serious problems, and neither party has asked for this solution.

Accordingly, we believe IIC should have the same scope of court—supervised discovery against the Clarkson defendants as the defendant reinsurers have. But what should that scope be? The Clarkson defendants ask to be treated as non-parties with respect to the reinsurers, since they have no claims against the Clarkson defendant and the Clarkson defendants' dispute with IIC is to be arbitrated.

The Clarkson defendants may be in this forum solely because of their agreements with IIC. While they (or some of them) agreed to this forum, they agreed that disputes would be arbitrated in the first instance, with the limited discovery obligation that implies. They did not agree to submit to document requests and interrogatories from the reinsurers, with whom they have (in this forum) no dispute at all.

Nevertheless, the arbitration agreements did not entitle the Clarkson defendants to reasonably expect to be shielded from discovery of evidence which is important to resolution of the dispute between IIC and the reinsurers. And since the Clarkson entities are parties, Rule 26(b)(1) gives the defendant reinsurers the right to conduct discovery against the Clarkson defendants whether or not they have any claims against them, subject to the court's power to limit discovery for good cause shown. Clarkson has not shown "annoyance, embarrassment, oppression, or undue burden or expense." The valid reasons for limiting or prohibiting discovery when arbitration proceedings are pending do not apply with respect to the reinsurers, and so the Clarkson defendants have not made the showing that would justify the kind of order they seek, limiting discovery to that available against non-parties.

We rule therefore that in the event Judge Lindberg orders a stay of proceedings between IIC and the Clark-

son defendants pending arbitration, discovery against the Clarkson defendants shall nevertheless proceed as provided in the rules applicable to the parties. If a stay of proceedings is denied, this ruling will be moot since the same result will obtain. The foregoing is without prejudice to any authority the arbitrators may have to order discovery, or permit its use in the arbitration proceeding.

The Clarkson defendants are granted an extension of time to answer or otherwise please until 20 days after either Judge Lindberg denies their motion for a stay pending arbitration or a final award of the arbitrators is served upon them.

Under Fed. R. Civ. Proc. 72(a) the parties have 10 days from the date hereof to file written objections to this Report and Recommendation with Judge Lindberg. Failure to file such objections will normally waive the right to appeal the rulings set forth in this Report. *Egert v. Connecticut General Life Ins. Co.*, 900 F.2d 1032, 1039 (7th Cir. 1990).

Respectfully submitted,

Bernard Weisberg
United States Magistrate Judge

Date: January 15, 1992

cc: All Attorneys of Record
(See Attached Service List)

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

INTERNATIONAL INSURANCE COMPANY, Plaintiff, v. CERTAIN UNDERWRITERS AT LLOYD'S LONDON, et al., Defendants.	)	
KEITH KERR, et al., Counter-plaintiffs, v. INTERNATIONAL INSURANCE COMPANY, Counter-defendant.	)	No. 88 C 9838 February 12, 1992 9:00 a.m. Chicago, Illinois

TRANSCRIPT OF PROCEEDINGS
BEFORE
THE HONORABLE GEORGE W. LINDBERG

APPEARANCES:

For the Plaintiff/Counter-defendant:

BAKER & McKENZIE
130 East Randolph Drive
Chicago, Illinois 60601
BY: MR. PAUL B. O'FLAHERTY, JR.

For certain Defendants:

PETERSON & ROSS
200 East Randolph Drive
Chicago, Illinois 60601
BY: MR. GREGORY HOPP

For certain Defendants:

ADLER, KAPLAN & BEGY
10 North Dearborn Street
Chicago, Illinois 60602
BY: MR. LARRY S. KAPLAN

For certain Defendants:

BIEDERMANN, HOENIG, MASSAMILLO
& RUFF
733 Third Avenue
New York, New York 10017
BY: MR. LAWRENCE MENTZ

For certain Defendants:

JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
BY: MS. DEBBIE L. MOECKLER

THE CLERK: 88 C 9838, International versus Certain Underwriters.

MR. HOPP: Gregory Hopp for Defendant reinsurers.

MR. O'FLAHERTY: Paul O'Flaherty on behalf of International Insurance Company, your Honor.

MR. MENTZ: Larry Mentz on behalf of the Clarkson defendants.

MR. KAPLAN: Larry Kaplan on behalf of Clarkson defendants.

MS. MOECKLER: Debbie Moeckler on behalf of SCOR.

THE COURT: Who is the party in the reinsurer? What's the name of the party?

MR. HOPP: It's 14 different people. It's Certain Underwriters at Lloyd's, et al.

THE COURT: That's the principal defendants. She is getting my material, I hope. I have worked on it, and I don't know what I did with it.

MR. HOPP: That happens to you, *too*?

THE COURT: Yes. That stuff is not easy to sort out. Thank god you listed out what your motions were. Why don't we proceed? I know what's involved.

MR. MENTZ: If I may, your Honor. Clarkson has made the emergency motion, so I will start first.

THE COURT: Sure.

MR. MENTZ: The position is relatively simple, your Honor. We believe we will be prejudiced if we are forced to submit to discovery as parties at this time while there are pending before your Honor objections to the magistrate's ruling.

We submit that letters rogatory would be the appropriate method by which any party could obtain discovery of us should they be advised and that that procedure is no different than what is being done with all other nonparties to this litigation.

For instance, your Honor, TLA, the London agency which is an affiliate of the Plaintiff, IIC, and which is the managing general agent or represented to be the managing general agent of IIC, has been subpoenaed in Atlanta, Georgia and is contesting the subpoenas in Atlanta, Georgia. The propriety and the scope of the discovery to which TLA is subjected is going to be determined by a federal court in Atlanta, Georgia.

We are equivalent to nonparties. There are no claims pending against us right now. There will be no claims unless your Honor accepts the objections to the magistrate's recommendation that proceedings against us be stayed. No other parties have any claims against us.

Effectively for all practical purposes, we are not parties to this litigation, notwithstanding whenever the technical situation may be.

THE COURT: What do you mean by that, the technical situation?

MR. MENTZ: We were sued. We are a third-party defendant. We are a named third-party defendant. We are a named defendant. However, any claims against us, assuming your Honor accepts the magistrate's recommendation, will be stayed. There are no cross-claims against us by reinsurers.

There are no claims against us by SCOR, the other defendant. So for all purposes there is nothing against us.

Your Honor, I might just bring up one other matter. Magistrate Weisberg has recommended to your Honor that all of plaintiff's claims against us be stayed pending arbitration pursuant to the Federal Arbitration Act. Now, that has been objected to, and your Honor has set a briefing schedule on it.

There was some argument before Magistrate Weisberg that we have created a discovery gridlock in this situation. Your Honor, however, the chronology is such that we don't believe that's accurate.

The discovery was stayed as to all parties for a substantial length of time in large part, we believe, because Magistrate Weisberg had raised significant subject matter jurisdictional concerns, which are also pending before your Honor.

During that time period, there was no real point in continuing the discovery until those points—

THE COURT: The subject matter jurisdiction, is that the July 15th order—

MR. HOPP: No.

THE COURT: —personal jurisdiction?

MR. MENTZ: September 12, I believe.

MR. HOPP: It's the question about diversity involving Lloyd's underwriters.

MR. MENTZ: The position is: We are not really parties to this litigation. All we are asking for now is a temporary stay of discovery until your Honor has an oppor-

tunity to see our objections, review our objections, to the magistrate's ruling requiring that we submit to discovery.

THE COURT: Well, Judge Weisberg found—I will use the word, you know, in a nontechnical senses—that you were at the eye of the hurricane. Your documents are at the eye of the hurricane to paraphrase his expression. You've got the core facts in this case. Is that not what he said?

MR. MENTZ: Well, in a nontechnical sense—I don't think we can dispute that we have witnesses and we have documents that both sides would like to see in this litigation, but, your Honor, the plain fact of this matter is: If we hadn't been improperly sued by IIC to begin with, we wouldn't be here fighting whether or not we are subject to discovery as a party.

People would be going after us with letters rogatory in London, England. To the extent that this Court authorized the issuance of letters rogatory, to the extent the English court authorized discovery against us, that's where we would be.

Clarkson got sued when they shouldn't have been because there was an arbitration agreement. Because we were sued improperly, we contend, and which Magistrate Weisberg seems to have supported, we are going to be subject to discovery in this forum when all our documents—and we are estimating them to be in excess of 500,000 pages—and all of our witnesses are located in London, England, and our review of those documents, just responding to the discovery request, whether we have to produce them while your Honor is considering the objections or not, will be massive.

It will be very prejudicial to Clarkson if your Honor ultimately holds that Magistrate Weisberg was wrong requiring us to submit to discovery as a party. Again, all we are asking here is for a temporary stay until your

Honor has an opportunity to review our objections to the magistrate's rulings.

THE COURT: The rationale for Judge Weisberg's declining to give you a stay other than for the purpose of this, for these objections, was what?

MR. MENTZ: I don't recall a rationale stated, your Honor, other than the fact that the magistrate thought that discovery should proceed against us. As we cited in our brief in support of the emergency motions, the ordinary rule is if you file an objection to a magistrate's ruling, it's effectiveness is stayed. That's what Morris said.

That's what we believe should take place in this circumstance because the prejudice to us, your Honor, is very significant—A temporary delay from reinsurers or from IIC's standpoint—Actually IIC shouldn't be able to get discovery before us as parties because they are in arbitration.

However, the temporary nature of the delay for reinsurers and IIC is not that prejudicial or not prejudicial at all. Whereas, if we have to go forward now while the matter is pending before your Honor, we will never get it back.

Your Honor, with respect to one of the defendants, CPIR, which also is called Clarkson Puckle International Reinsurances, there's a motion to dismiss for lack of personal jurisdiction. It's still pending before the magistrate.

Under normal circumstances a party that has challenged the personal jurisdiction of the Court is never required to be subject to discovery on the matters. With respect to that, there should be a temporary stay as to the magistrate's ruling, and your Honor rule as to whether or not we are subject to jurisdiction.

THE COURT: When were they made counter/third-party defendant?

MR. MENTZ: We were served March 1. I believe the second supplemental and amended complaint and the amended counterclaim were filed on February 26, 1991, approximately, one year ago, your Honor. In terms of delaying discovery, I would reiterate that in large part the discovery was held up because of the magistrate's significant concerns about the subject matter jurisdiction.

Our motion has only played a small part in delaying any discovery against us solely as parties, your Honor. We have offered to and we have suggested to the other parties that they proceed against us by letters rogatory, and they have not done so.

THE COURT: Let me hear from ICC.

MR. O'FLAHERTY: Paul O'Flaherty. If the Court please, I would be glad to summarize Magistrate Weisberg's rationale. He did recognize, as your Honor observed, that the Clarkson documents and witnesses are at the heart of this controversy. If I wanted to make the shortest conceivable summary of the disputes between my clients and Mr. Hopp's clients, it might be whose agent was Clarkson.

They claim that we hold responsibility for their actions, and we hold otherwise. Magistrate Weisberg, therefore, recognized that discovery against Clarkson, particularly documentary discovery, is something inevitable and has to be accomplished in connection with the underlying lawsuit. It's so central, in fact, that at one point my client, International Insurance Company, was threatened with sanctions for not producing Clarkson documents.

We made efforts to secure those documents voluntarily through informal means. We weren't able to do that. This is something we have to get onto as a matter of practical administration in this case.

Moreover, Magistrate Weisberg recognized that in focusing on their arbitration rights as to International Insur-

ance Company, that's a one-dimensional analysis of a multi-dimensional problem. However, the fact they may have some arbitration rights vis-a-vis one party in no way limits Mr. Hopp's entitlement or the reinsurers' entitlement to take discovery from the Clarkson defendants.

It is necessary to open it up for the reinsurers. Fundamental fairness says IIC has to have the same scope of discovery. Again, that's the only practical way to proceed as in terms of sound judicial administration.

Magistrate Weisberg considered the possibility in terms of paring out the issues from those that are arbitrable to those that are not. Magistrate Weisberg recognized it was an impractical conclusion because what that's going to lead to in its conclusion is wrangling over what is arbitrable and what is not and the possibility of duplicative discovery in the arbitration action and the action in court. He correctly rejected that as a proper alternative.

Magistrate Weisberg referred repeatedly in the recommendation to this Court to the procedural means of Rule 26 and otherwise for preventing any undue harassment and oppression of the Clarkson defendants.

This is discovery that would clearly be subject to the supervision of the Court. I think because he gave us just a narrow time frame to appear before your Honor and resolve this matter, Magistrate Weisberg is also conveying a necessity for moving discovery along in this case. The Clarkson defendants have been with us now for a year.

The underlying case is in excess of three years old. There is an important necessity for moving it along.

MR. HOPP: Gregory Hopp for reinsurers. Let me make three quick points. First of all, the magistrate was also absolutely correct that Clarkson's documents are at the eye of the hurricane. There are two good ways to show that.

One is—Mr. O'Flaherty alluded to—the magistrate has already indicated that he thought an award of sanctions was appropriate based on IIC's failure to produce these documents.

We hear from IIC, however, that Clarkson will not give them the documents. Likewise, there is an appeal pending before you of that denial by the magistrate of IIC's motion to compel some of our clients to produce those documents. So Mr. Mentz admits it, and I think Paul and I have agreed as well, that these documents are absolutely of critical importance.

The point that Mr. Mentz makes that they are essentially a nonparty and that letters rogatory, just like subpoenas, would give us access to those documents is, if I may, somewhat disingenuous.

First of all, they aren't like a nonparty. They are a party, although, the claims against them have been stayed. Those three defendants have admitted the jurisdiction of this court in dealing with them.

CPIR, Clarkson Puckle International Reinsurances, is a small subsidiary. That's really a red herring, and they have admitted that this court has jurisdiction over the corporate parent and other related entities that have a role here.

Likewise, the way English courts deal with letters rogatory, we would have to show, first, the exact date of every document, to whom, from whom. We would have to show that it is for purposes of trail that we seek that as opposed to simply purposes of discovery.

The very reason that Mr. Mentz is willing to propose so quickly the idea of letters rogatory is he knows it affords us no relief. That is an option that IIC attempted to pursue after the magistrate's sanctions.

See, the fact is that Clarkson is a party, and unless IIC and reinsurers are allowed to propound discovery to them

as a party, we aren't going to get these documents. The first point—and I apologize for going o, your Honor—is that there is probably a practical solution here. There are a lot of extra claims made in Clarkson's briefs.

For instance, they talk about Clarkson Puckle International Reinsurances' jurisdictional challenge. They talk about the specter of depositions. Well, all the documents will come through parties that have admitted jurisdiction. No depositions of Clarkson's parties have been noticed at this time.

As far as the reviewing of the documents that have been produced in London, I think everyone would agree that the English claims of privilege are even more broad than American claims of privilege.

So at the very least it would be easy, I think, for them to pack up the documents that have been produced in the English litigation and produce them here. That is something that can be done without this onerous privilege review that they have talked about. So in short, your Honor, there is not a more important source of documents here.

The Court has jurisdiction over them as a party, and that is a fact. There is an easy practical solution to all the red herrings that are raised in these motions.

MR. MENTZ: May I say something in reply, your Honor?

THE COURT: Surely.

MR. MENTZ: Just a few points. There are no claims pending against us that this Court is going to be deciding, certainly, at this time. There is before Magistrate Weisberg a motion to sever us from this proceeding because there are no claims pending against us at this time.

We would argue at that point, certainly, we could not be treated as parties if that motion is granted. No attorney, we believe, would just pass over documents that

have been produced in England without reviewing them. We are going to have to review the documents before they be produced.

So for it to be suggested that it's unnecessary and we will not be burdened, we think is incorrect. We will be burdened. We will be substantially burdened. The situation with respect to CPIR, Clarkson Puckle International Reinsurers, is additionally egregious, your Honor, if we are not subject to personal jurisdiction here.

Finally, your Honor, two things. If your Honor is going to deny the temporary stay here, we would request two weeks in order to give us time to file with the Seventh Circuit or that your Honor certify this for an interlocutory appeal before the Seventh Circuit.

If we file with the Seventh Circuit, that that stay be extended while the matter is pending before the Seventh Circuit.

MR. O'FLAHERTY: Just one final thought, your Honor. I think since the specter of appeal has been raised here, you have the gist of our position here this morning.

We are certainly prepared, if your Honor would like, to cite legal authorities in support of Magistrate Weisberg's recommendation. We are prepared to move very rapidly on that and provide the Court with a memorandum of law by Monday. If your Honor is prepared to rule, that's fine, too.

THE COURT: I have had the opportunity to review this rather extensively. I am satisfied that the third-party defendant's motion for a protective order should be denied, and it is denied.

The second part of the Clarkson motion was with regard to a briefing schedule for—

MR. MENTZ: The objections to the magistrate's original ruling, your Honor, on January 15, which said that we were subject to discovery as parties.

THE COURT: Well, then that is obviated now.

MR. MENTZ: Is your Honor essentially ruling on the objections as well?

THE COURT: Yes. What I want you to do—If you are insisting on appealing this thing, then you ought to get on with it. I will tell you why.

First of all, I think the magistrate's reasoning is very sound. He is trying to move this litigation along. From the standpoint of this court, it is a very old case. The United States Senate has spoken.

They want these cases moved in the interest of the parties and the public generally. I think the magistrate realized that, and I don't think the Clarkson third-party defendants denied that their materials are at the heart of the matter.

Rather than taking the long route, I think that groundwork has been laid to permit a direct approach. That's the way the Court feels the litigation should proceed.

It is not the sense of the Court that the Clarkson third-party defendants would be prejudiced in any manner whatsoever other than having to produce now what they might otherwise prefer to produce at some later date or have screened through the letters rogatory process in England.

So the objective of the Court is to get this litigation moving without prejudice to Clarkson. I believe that Magistrate Judge Weisberg has perceived correctly how to do that.

What's left then for this emergency motion?

MR. MENTZ: Just the request for the temporary stay to get up to the Seventh Circuit.

THE COURT: How much time?

MR. MENTZ: Two weeks, your Honor.

THE COURT: Counsel, any problem with that?

MR. O'FLAHERTY: No, your Honor.

MR. MENTZ: Would the stay continue in effect if we go up to the Seventh Circuit, your Honor?

THE COURT: Yes.

THE CLERK: Stay is in effect until February 26.

MR. MENTZ: And continues if we file with the Seventh Circuit.

THE COURT: Let me put it this way. If you do, in fact, do that, then I think you ought to go to the Seventh Circuit and ask them for the stay. I think that would be more appropriate. I don't like to run their business any more than I am sure they want to run mine.

MR. HOPP: Very good.

MR. O'FLAHERTY: Thank you, your Honor.

MR. HOPP: Thank you, your Honor.

THE COURT: You have your briefing schedule on those other matters fully in place, I take it?

MR. HOPP: We do.

THE COURT: Okay. We have got that material organized. We will be waiting for you.

MR. HOPP: Thank you, your Honor.

C E R T I F I C A T E

I certify the foregoing is a correct transcript from the record of proceedings in the above-entitled case on February 12, 1992.

Therese A. Pintozzi — *2-18-92*
Official Court Reporter — Date

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

H. Stuart Cunningham
CLERK

Office of the Clerk

Peter Hoenig
Biedermann, Hoenig, Massamillo & Ruff
733 Third Avenue — 18th Floor
New York, NY 10017

Case Number: 1:88-cv-09838

Title: International Ins v. Certain Underwriters

Assigned Judge: Honorable George W. Lindberg

MINUTE ORDER of 2/12/92 by Hon. George W. Lindberg: denying third-party defendant Clarkson's motion for protective order [953-1]. Briefing schedule on objections to Magistrate Judge's 01/15/92 ruling is stayed to and including 02/26/92. Status hearing is set for 02/26/92 at 9:30 a.m. Mailed notice

This order was entered on the docket by the Clerk February 13, 1992

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure. It was generated by the automated docketing system being introduced to handle the civil dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

H. Stuart Cunningham
CLERK

Office of the Clerk

Larry S. Kaplan
Adler, Kaplan & Begy
10 North Dearborn Street
4th floor
Chicago, IL 60602

Case Number: 1:88-cv-09838
Title: International Ins. v. Certain Underwriters
Assigned Judge: Honorable George W. Lindberg

MINUTE ORDER of 2/27/92 by Hon. George W. Lindberg: The Court's order of February 12, 1992 is clarified and amended as follows: Third party defendant Clarkson's objections to the report and recommendation of the Magistrate Judge of January 15, 1992 are overruled; Clarkson's motion for protective order against further discovery and a briefing schedule thereon are denied. Discovery as to Clarkson is stayed until March 13, 1992 pending appeal of this order to the Seventh Circuit. Mailed notice

This order was entered on the docket by the Clerk February 28, 1992

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure. It was generated by the automated docketing system being introduced to handle the civil dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Name of Assigned Judge or Magistrate Judge
George W. Lindberg

Case Number
88 C 9838

Date
June 12, 1992

Case Title
INTERNATIONAL INSURANCE COMPANY
V. CERTAIN UNDERWRITERS

DOCKET ENTRY:

* * * * *

(10) X [Other docket entry]
Motion of "Clarkson Defendants" for an order accepting the report and recommendations of U.S. Magistrate Judge Bernard Weisberg of December 20, 1991 concerning the Clarkson defendants' motion to stay arbitration is granted.

* * * * *

X No notices required, advised in open court.

* * * * *

SB courtroom deputy's initials

* * * * *

ED-6
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Document #1135

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UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

March 13, 1992

Before:

HON. RICHARD D. CUDAHY, Circuit Judge
HON. DANIEL A. MANION, Circuit Judge
HON. MICHAEL S. KANNE, Circuit Judge

No. 92-1478

IN THE MATTER of:

CLARKSON PUCKLE GROUP, LIMITED,
ERAS (INTERNATIONAL), LIMITED,
CLARKSON PUCKLE INTERNATIONAL
REINSURANCES, LIMITED, et al.,

Petitioners.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 88 C 9838

GEORGE W. LINDBERG, Judge

This matter comes before the court for its consideration of the following documents:

1. "PETITION FOR WRIT OF MANDAMUS OF DEFENDANTS AND THIRD-PARTY DEFENDANTS, CLARKSON PUCKLE GROUP, LIMITED, ERAS (INTERNATIONAL) LIMITED, CLARKSON PUCKLE INTERNATIONAL REINSURANCES, LIMITED, AND BAIN CLARKSON, LIMITED" filed herein on February 28, 1992, by counsel for defendants and third-party defendants-petitioners.

2. "RESPONSE OF PLAINTIFF/THIRD-PARTY PLAINTIFF INTERNATIONAL INSURANCE COMPANY TO PETITION FOR WRIT OF MANDAMUS" filed herein on March 9, 1992, by counsel for International Insurance Company.

3. "RESPONSE OF DEFENDANTS CERTAIN UNDERWRITERS AT LLOYD'S TO PETITION FOR WRIT OF MANDAMUS OF DEFENDANTS AND THIRD-PARTY DEFENDANTS, CLARKSON PUCKLE GROUP, LIMITED, ERAS (INTERNATIONAL) LIMITED, CLARKSON PUCKLE INTERNATIONAL REINSURANCES, LIMITED, AND BAIN CLARKSON, LIMITED" filed herein on March 9, 1992, by counsel for defendants.

4. "PETITIONERS' MOTION FOR ENTRY OF A PROTECTIVE ORDER TO ALLOW THE FILING OF EXHIBITS UNDER SEAL" filed herein on February 28, 1992, by counsel for the petitioners.

5. "EMERGENCY MOTION OF PETITIONERS FOR A FURTHER STAY OF THE DISTRICT COURT'S ORDER OF FEBRUARY 27, 1992 UNTIL TWENTY DAYS AFTER A FINAL ORDER IS ENTERED WITH RESPECT TO THE PETITION FOR WRIT OF MANDAMUS" filed herein on March 9, 1992, by counsel for the petitioners.

On consideration thereof,

IT IS ORDERED that the PETITIONERS' MOTION FOR ENTRY OF A PROTECTIVE ORDER TO ALLOW THE FILING OF EXHIBITS UNDER SEAL IS GRANTED.

IT IS FURTHER ORDERED THAT THE PETITION FOR WRIT OF MANDAMUS OF DEFENDANTS AND THIRD-PARTY DEFENDANTS, CLARKSON PUCKLE GROUP, LIMITED, ERAS (INTERNATIONAL) LIMITED, AND BAIN CLARKSON, LIMITED is DENIED and the EMERGENCY MOTION OF PETITIONERS FOR A FURTHER STAY OF THE DISTRICT COURT'S ORDER OF FEBRUARY 27, 1992 UNTIL TWENTY DAYS AFTER A FINAL ORDER IS ENTERED WITH RESPECT TO THE PETITION FOR WRIT OF MANDAMUS IS DENIED.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

April 21, 1992

Before:

HON. RICHARD D. CUDAHY, Circuit Judge
HON. DANIEL A. MANION, Circuit Judge
HON. MICHAEL S. KANNE, Circuit Judge

Appeal From the United States District Court
for the Northern District of Illinois, Eastern Division
No. 88 C 9838
GEORGE LINDBERG, Judge
BERNARD WEISBERG, Magistrate Judge

No. 92-1478

In the Matter of Petitioners,
Clarkson Puckle Group, Limited, et al.

INTERNATIONAL INSURANCE COMPANY,
Plaintiff,

—vs.—

CERTAIN UNDERWRITERS AT LLOYD'S et al.,
Defendants.

KEITH WILLIAM KERR, et al.,
Counter-Plaintiffs,

—vs.—

INTERNATIONAL INSURANCE COMPANY,
Counter-Defendant.

INTERNATIONAL INSURANCE COMPANY,
Counter-Defendant/Third-Party Plaintiff,

—vs.—

SOCIETE COMMERCIALE DE REASSURANCE S.A., CLARKSON PUCKLE GROUP, LIMITED, ERAS (INTERNATIONAL) LIMITED, CLARKSON PUCKLE INTERNATIONAL REINSURANCES, LIMITED, AND BAIN CLARKSON, LIMITED,
Third-Party Defendants.

ORDER

On consideration of the petition for rehearing, with suggestion for rehearing en banc filed by defendants and third-party defendants, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

UNITED STATES COURT OF APPEALS cs

For the Seventh Circuit
Chicago, Illinois 60604

September 30, 1992

Before

Hon. JOHN L. COFFEY, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge

INTERNATIONAL INSURANCE COMPANY, Plaintiff-Third/Party Plaintiff-Appellee, No. 92-2530 v. CERTAIN UNDERWRITERS AT LLOYDS' LONDON, DOMINION INSURANCE COMPANY LIMITED, HANNOVER REINSURANCE COMPANY, et al., Defendants, and, CLARKSON PUCKLE GROUP, LIMITED, ERAS (INTERNATIONAL) LIMITED, CLARKSON PUCKLE INTERNATIONAL REINSURANCES, LIMITED, et al., Third/Party Defendants-Appellants.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 88 C 9838 George W. Lindberg, Judge.

This matter comes before the court for its consideration of the following documents:

1. PLAINTIFF-APPELLEE INTERNATIONAL INSURANCE COMPANY'S MOTION TO DISMISS THE APPEAL filed herein on 7/16/92, by counsel.

2. DEFENDANTS-APPELLANTS' RESPONSE TO PLAINTIFF-APPELLEE'S MOTION TO DISMISS filed herein on 7/28/92, by counsel.

On consideration thereof,

IT IS ORDERED that the Motion to Dismiss is GRANTED and this appeal is DISMISSED for lack of jurisdiction.